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ABSTRACT

This document presents the transcript of the September 18, 1980, oversight hearing of the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor regarding section 431 of the General Education Provisions Act, which gives Congress the authority to disapprove U.S. Department of Education regulations if they are found inconsistent with the authorizing statute. Earlier in 1980, Congress disapproved regulations on the arts in education, law-related education, the Education Appeal Board, and Title IV of the Elementary and Secondary Education Act governing grants for school equipment. In six verbal presentations, ten printed statements, and numerous exchanges, witnesses and Committee members discussed the constitutionality of section 431 and the particulars of the four programs in question. Among the witnesses were U.S. Secretary of Education Shirley M. Hufstedler and Assistant Attorney General John M. Harmon, who argued against section 431's constitutionality, and Georgia Representative Elliott H. Levitas, two officials of the Kentucky State Department of Education, and two lawyers for Congress, who argued for the section's constitutionality. (RW)

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OVERSIGHT HEARING ON CONGRESSIONAL DISAPPROVAL OF EDUCATION REGULATIONS

U.S. DEPARTMENT OF HEALTH,
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HEARING

BEFORE THE

SUBCOMMITTEE ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, D.C., ON SEPTEMBER 18, 1980

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ED205198

CONTENTS

Page
Hearing held in Washington, D.C., on September 18, 1980 1

Statement of—

Gressman, Prof. Eugene, School of Law, University of North Carolina, Chapel Hill 104
Harmon, John M., Assistant Attorney General's Office of Legal Counsel, U.S. Department of Justice 19
Hart, Don, Director, Division of Compensatory Education and Edward L. Fossett, Office of Legal Services, Kentucky State Department of Education 130
Hufstedler, Hon. Shirley M., Secretary, U.S. Department of Education 64
Kennedy, Cornelius B., Esq., Kennedy & Webster, Washington, D.C 106
Levitas, Hon. Elliott H., a Representative in Congress from the State of Georgia 33

Prepared statements, letters, supplemental materials, et cetera—

Association of American Publishers, statement of 136
"Congressional Disapproval of Education Regulations," article by K. Forbis Jordan, senior specialist in education and Wayne Riddle, specialist in education, Education and Public Welfare Division 139
Cooke, Charles M., Federal program coordinator, California Department of Education, testimony on 154
Gressman, Prof. Eugene, School of Law, University of North Carolina, Chapel Hill, prepared statement of 108
Harmon, John M., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice: ....
  Attachment 1 44
  Attachment 2 49
  Prepared testimony of 33
Hart, Don, director, Division of Compensatory Education and Edward L. Fossett, Office of Legal Services, Kentucky State Department of Education, prepared statement presented by 131
Hufstedler, Hon. Shirley M., Secretary, U.S. Department of Education, prepared testimony of 64
Kennedy, Cornelius B., Esq., Kennedy & Webster, Washington, D.C., prepared statement of 121
Levitas, Hon. Elliott H., a Representative in Congress from the State of Georgia, prepared testimony of 27
Scanlon, Robert G., secretary of education, Commonwealth of Pennsylvania, prepared statement of 92

4

OVERSIGHT HEARING ON CONGRESSIONAL DISAPPROVAL OF EDUCATION REGULATIONS

THURSDAY, SEPTEMBER 18, 1980

House of Representatives,
Subcommittee on Elementary, Secondary, and Vocational Education,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:25 a.m., pursuant to call, in room 2175, Rayburn House Office Building, Hon. Carl D. Perkins (chairman of the subcommittee) presiding.

Members present: Representatives Perkins, Hawkins, Ford, Biaggi, Simon, Beard, Miller, Weiss, Corrada, Kildee, Stack, Kogovsek, Musto, Goodling, Kramer, Erdahl, and Petri.

Staff present: John F. Jennings, counsel: Nancy L. Kober, staff assistant; William Clohan, minority counsel for education; and Rich DiEugenio, minority legislative associate.

Chairman **Perkins**. This morning the Subcommittee on Elementary, Secondary, and Vocational Education is conducting an oversight hearing on congressional disapproval of regulations for education programs.

Section 431 of the General Education Provisions Act gives Congress the authority to disapprove final regulations for education programs, within 45 days of publication and transmission, if Congress finds they are inconsistent with the authorizing statute.

Congress exercised this authority earlier this year, when we disapproved four sets of final regulations issued by the Department of Education.

The disapproved regulations dealt with the arts in education program, the law-related education program, the Education Appeal Board, and the title IV programs under the Elementary and Secondary Education Act.

We took this action because we felt these regulations either went beyond or contradicted the legislation from which they derived their authority.

The Attorney General has taken the position that Congress acted unconstitutionally in disapproving these regulations.

After much consideration, the Department of Education has decided to implement the Education Appeal Board regulations unchanged.

The Department has also announced that the arts in education and law-related education regulations will be implemented unchanged for the upcoming fiscal year but will be revised in the future.

In addition, the Department has revised the title IV regulations to take care of Congress concern.

The purpose of the hearing today is to provide a forum for a discussion of the status of these four specific sets of regulations and also the general issue of congressional disapproval of regulations.

In my opinion, it is unfortunate that we had to take this step and disapprove these regulations. But I feel strongly that we in Congress have a responsibility to see that the laws we write are properly implemented by the executive branch, and that the regulations promulgated by the Department do not go beyond the statutes.

I would like to make very clear, however, that I am willing to work with the administration, if the Secretary so desires, to institute procedures for this committee's handling of disapproval actions.

I am willing to develop procedures to insure that the Department is given full and fair notice of any intent on our part to disapprove regulations. And I would certainly be agreeable to open communication with the Department at all stages in the development of regulations

I do want to state at the outset, since Secretary Hufstedler is here, that we will be delighted to cooperate with the Secretary on any regulations that we feel are on base and let her know at another date if there is any dissatisfaction on the part of the committee. We will be delighted to do that.

Since the Secretary is here this morning, and we have a quorum present, I am going to call on the Secretary to come around and identify herself for the record and proceed in any way that she prefers.

Mr. John M. Harmon, I understand, is appearing with you.

STATEMENTS OF HON. SHIRLEY M. HUFSTEDLER, SECRETARY, U.S. DEPARTMENT OF EDUCATION AND JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Secretary **Hufstedler**. With your leave, sir, in order to promote an orderly presentation of the testimony, I have requested the privilege of having Mr. Harmon of the Attorney General's Office testify first, if it pleases you, Mr. Chairman.

Chairman **Perkins**. Go right ahead and testify.

[The prepared statement of John Harmon follows:]

PREPARED TESTIMONY OF JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today on behalf of the Department of Justice and the Attorney General to discuss the Attorney General's June 5, 1980 opinion, concerning the constitutionality of the "legislative veto" provision contained in § 431 of the General Education Provisions Act, the GEPA. 1/ That provision purports to authorize Congress, by concurrent resolutions that are not to be submitted to the President for his approval or veto, to disapprove certain regulations that are issued by the Department of Education. The Attorney General issued his letter in response to Secretary Hufstedler's request for his opinion on the constitutionality of four concurrent resolutions that Congress passed last May, which disapproved Department of Education regulations in connection with four statutory programs.

I am submitting for the record a copy of the Attorney General's opinion, which very much echoes the views he expressed almost exactly a year ago in testimony before the House Subcommittee on Rules of the House. 2/ Because the Attorney General's discussion in that testimony is quite thorough, and because the Attorney General and his representatives have had frequent occasion in the past to express to Congress his position that legislative vetoes violate the Constitution, I will devote my prepared statement only to a brief summary of the Attorney General's opinion and then respond to any questions you may have.

1/ 20 U.S.C. § 1232.

2/ Regulatory Reform and Congressional Review of Agency Rules: Hearings on H.R. 1776 Before the Subcomm. on Rules of the House of the House Comm. on Rules, Pt. I, 96th Cong., 1st Sess. 364-442 (1979).

The Attorney General's analysis begins with an uncontroversial premise: in designing our constitutional form of government, the Framers erected a carefully balanced system of accountability based on a tripartite separation of powers. They vested the power to legislate in Congress, the power to execute the laws in the Executive branch, and the power to interpret the law in the courts. None of these powers is absolute in the hands of any one branch. Under the Constitution, the exercise of power by any branch of the Government is subject to carefully designed checks that may be exercised by one or both of the other two branches.

A critical check on the legislative process is the President's power, under Article 1, § 7, to review all legislation passed by Congress. Under the so-called Presentation Clauses, Congress must present all legislative measures of public effect, regardless of their form or designation, to the President for his approval or veto. Legislative vetoes such as those resolutions that Congress has passed under § 431 of the GEPA violate the letter and the spirit of these provisions. They purport to enable Congress to legislate without presidential review. Specifically, they would allow Congress, without presidential review, to block the execution of the law under discretionary authority that Congress has previously granted to the President or some other officer or agency of the Executive branch. To give effect to such resolutions would be to permit a profound disruption in the constitutional separation of powers, and the checks and balances that protect it.

It is not possible to excuse a measure that violates the Constitution on the ground that Congress deems the measure "necessary and proper" for carrying into execution the powers of the Government. In Buckley v. Valeo, 424 U.S. 1 (1976), it was argued that officers of Congress could, under the Necessary and Proper Clause, Art. I, § 8, cl. 18, appoint commissioners of the Federal Election Commission, notwithstanding the fact that

Art. II, § 2, cl. 2 of the Constitution places the appointment power in the President. The Court explained:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in section 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so. 3/

The Constitution establishes the President's veto power with the same clarity and specificity with which it establishes the appointment power and prohibits bills of attainder and ex post facto laws Under Buckley, we believe it follows that the Necessary and Proper Clause is not a source of power for evasion, through legislative vetoes, of the specific provision that Art. 1, § 7, makes for the President's review of legislation.

The purpose of the separation of powers is to avoid the concentration of the powers of government in any one branch. This is not to say that every governmental function is inherently legislative, executive, or judicial, and must be assigned to

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3/ 424 U.S. at 135.

only one branch. When an activity might be assigned to more than one branch, it is the task of Congress to allocate that responsibility. Once it has done so, however, our constitutional system demands that Congress remove itself from the control or discharge of functions that it has assigned to the Executive or to the courts, except through the plenary legislative processes of amendment and repeal. In other words, Congress' power over the execution and implementation of a statute ends with its enactment. To permit otherwise would allow Congress to usurp the President's power to execute the law and the courts' power to interpret it.

It must be stressed, as the President emphasized in his June 21, 1978 message to Congress on the subject of legislative vetoes, that this analysis in no way derogates from the legitimacy or desirability of agency accountability and congressional oversight. What the Attorney General states, however, is that Congress must accomplish its oversight within the confines of the Constitution, just as the Executive must perform its duties and exercise its powers within our clearly established system of checks and balances.

Office of the Attorney General
Washington, D.C. 20530

5 JUN 1980

Honorable Shirley M. Hufstedler
The Secretary
Department of Education
Washington, D.C.

My Dear Madam Secretary:

I am responding to your request for my opinion regarding the constitutionality of section 431 of the General Education Provisions Act (GEPA), 20 U.S.C. § 1232(d). That provision purports to authorize Congress, by concurrent resolutions that are not to be submitted to the President for his approval or veto, to disapprove final regulations promulgated by you for education programs administered by the Department of Education. Acting under this authority, Congress has recently disapproved regulations concerning four programs of your Department. 1/ For reasons set forth below, I believe that § 431 is unconstitutional and that you are entitled to implement the regulations in question in spite of Congress' disapproval.

1/ H. Con. Res. 318, 96th Cong., 2d Sess. (1980), disapproves regulations issued under § 451 of the GEPA, 20 U.S.C. § 1234, pertaining to the operations of the Education Appeal Board. 45 Fed. Reg. 22634 (1980). H. Con. Res. 319, 96th Cong., 2d Sess. (1980), disapproves regulations issued under § 322 of the Elementary and Secondary Education Act of 1965 [ESEA], 20 U.S.C. § 2962, pertaining to arts education. 45 Fed. Reg. 22742 (1980). H. Con. Res. 332, 96th Cong., 2d Sess. (1980), disapproves regulations issued under §§ 346-48 of the ESEA, 20 U.S.C. §§ 3001-03, pertaining to law-related education. 45 Fed. Reg. 27880 (1980). S. Con. Res. 91, 96th Cong., 2d Sess. (1980), disapproves regulations issued under Title IV of the ESEA, 20 U.S.C. §§ 3081 *et seq.*, pertaining to grants to state and local education agencies for educational resources. 45 Fed. Reg. 23602 (1980). The statutory authority for issuance of these regulations was added to the GEPA or the ESEA by the Education Amendments of of 1978, Pub. L. No. 95-561, 92 Stat. 2143.

I.

Under 20 U.S.C. § 1232(d), your Department is required, when it promulgates any final regulation for an "applicable program," 2/ to transmit that regulation to the Speaker of the House and to the President of the Senate. This section further provides:

> Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation.

In short, the two Houses of Congress can, without Presidential participation, prevent the Executive from executing substantive law previously enacted by the Congress with respect to education programs. Moreover, § 1232(d), on its face, purports to delegate to the two Houses of Congress the constitutional function historically reserved to the courts to ensure that the execution of the law by the Executive is consistent with the statutory bounds established in the legislative process.

In designing a federal government of limited powers, the Framers of the Constitution were careful to assign the powers of government to three separate, but coordinate branches. They vested legislative power in the Congress, the power to execute the laws passed by the Congress in the Executive, and the power finally to say what the law is in the Judiciary. In ordering

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2/ Under the GEPA, an "applicable program" is "any program for which an administrative head of an education agency has administrative responsibility as provided by law or by delegation or authority pursuant to law." 20 U.S.C. § 1221(b) and (c)(1)(A). Two Department regulations recently disapproved by Congress were promulgated originally by the Commissioner of Education, under the former Department of Health, Education, and Welfare. The Commissioner's functions, however, were transferred to you under the Department of Education Organization Act, § 301(a)(1), Pub. L. No. 96-88, 93 Stat. 677 (1979). All four programs involved are now administered under your authority.

these relationships, the Framers were careful, in turn, to limit each branch in the exercise of its powers. The power of Congress to legislate was not left unrestrained, but was made subject to the President's veto. Neither was the President's power to execute the law left absolute, but Congress was empowered to constrain any executive action not committed by the Constitution exclusively to the Executive by passing legislation on that subject. Should such legislation be vetoed by the President, Congress could use its ultimate authority to override the President's veto. Both of the political branches were, in turn, to be checked by the courts' power to take jurisdiction to determine the existence of legislative authority for executive actions, and to review the acts of both Congress and the Executive for constitutionality. This, in simplest form, is our carefully balanced constitutional system.

The legislative veto mechanism in § 1232(d) upsets the careful balance devised by the Framers. Viewed as "legislative" acts, legislative vetoes authorize congressional action that has the effect of legislation but deny to the President the opportunity to exercise his veto power under Art. I, § 7 of the Constitution. Viewed as interpretive or executive acts, legislative vetoes give Congress an extra-legislative role in administering substantive statutory programs that impinges on the President's constitutional duty under Art. II, § 3, of the Constitution faithfully to execute the laws. Viewed as acts of quasi-judicial interpretation of existing law, legislative vetoes arrogate to the Congress power reserved in our constitutional system for the non-political Judicial Branch. Thus, however they may be characterized, legislative vetoes are unconstitutional.

A. The Presentation Clauses

As illustrated by the four recent exercises of legislative veto power under § 1232(d), legislative veto devices are functionally equivalent to legislation because they permit Congress, one of its Houses, or even, on occasion, one or two of its committees, to block the execution of the law by the Executive for any reason, or indeed, for no reason at all. Under § 1232(d), the two Houses of Congress could, by passing successive concurrent resolutions, bring to a halt substantive programs, the authority for which was enacted by prior Congresses with the participation of the President. Such legislative veto devices cannot stand in the face of the language and history of the Presentation Clauses, Art. I, § 7, cls. 2 and 3.

Clause 2 provides that every bill that passes the House and the Senate shall, before it becomes law be presented to the President for his approval or disapproval. 3/ If disapproved, a bill does not become law unless repassed by a two-thirds vote of each House.

At the Philadelphia Convention of 1787, the Framers considered and explicitly provided for the possibility that Congress, by passing "resolutions" rather than bills, might attempt to evade the requirement that proposed legislation be presented to the President. During the debate on Art. I, §7, James Madison observed:

> If the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolutions, votes &c -- [and he] proposed that "or resolve" should be added after "bill" . . ., with an exception as to votes of adjournment &c.

2 M. Farrand, Records of the Federal Convention of 1787 301 (rev. ed. 1937).

3/ Clause 2 provides, in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Madison's notes indicate that "after a short and rather confused conversation on this subject," his proposal was at first rejected. However, at the commencement of the following day's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it. It passed by vote of 9-1. Id., 301-35. Thus, the Constitution today provides, in addition to Clause 2 of § 7 dealing with the passage of "bills," an entirely separate clause, Art. I, § 7, cl. 3, as follows:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

I believe it is manifest, from the wording of Clause 3 and the history of its inclusion in the Constitution as a separate clause apart from the clause dealing with "bills," that its purpose is to protect against all congressional attempts to evade the President's veto power. 4/ The function of the Congress in our constitutional system is to enact laws, and all final congressional action of public effect, whether or not it is formally referred to as a bill, resolution, order or vote, must follow the procedures prescribed in Art. I, § 7, including presentation to the President for his approval or veto.

4/ The President was given his veto power, in part, in order that he might resist any encroachment on the integrity of the Executive Branch. See The Federalist, No. 48. His participation in the approval of legislation is also crucial because of his unique constitutional status as representative of all the people. As Chief Justice Taft stated in 1926:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than the members of either body of the Legislature . . . .

Myers v. United States, 272 U.S. 52, 123 (1926).

B. The Separation of Powers

(1) Executing the Law

The principle of separation of powers underlying the structure of our constitutional form of government generally provides for the separation of powers among the Legislative, Executive, and Judicial Branches, and provides for "checks and balances" to maintain the integrity of each of the three branches' functions. Generally speaking, the separation of powers provides that each of the three branches must restrict itself to its allocated sphere of activity: legislating, executing the law, or interpreting the law with finality. This is not to say that every governmental function is inherently and of its very nature either legislative, executive, or judicial. Some activity might be performed by any of the three branches -- and in that situation it is up to Congress to allocate the responsibility. *See, e.g.*, *Wayman v. Southard*, 10 Wheat. 1, 42-43, 46 (1825) (Chief Justice Marshall). Once Congress, by passing a law, has performed that function of allocating responsibility, however, the separation of powers requires that Congress cannot control the discharge of those functions assigned to the Executive or the Judiciary, except through the plenary legislative process of amendment and repeal.

The underlying reason, well stated by James Madison, is that otherwise the concentration of executive and legislative power in the hands of one branch might "justly be pronounced the very definition of tyranny." *The Federalist*, No. 47, at 324 (Cooke ed. 1961). The shifting of executive power to the Legislative Branch which would be occasioned by these legislative veto devices is, I believe, undeniable; the concentration of this blended power is precisely what the Framers feared and what they set about to prevent.

The Constitution's overall allocations of power may not be altered under the guise of an assertion by the Congress of its power to pass laws that are "necessary and proper for carrying into Execution . . . Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof," Art. I, § 8, cl. 18. 5/ As the

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5/ It is fundamental to our concept of limited federal government that power exercised by the Legislative, Executive and Judicial Branches be traced to a provision of the Constitution

[Footnote 5/ continued on page 7]

Supreme Court made clear in Buckley v. Valeo, 424 U.S. 1 (1976), the exercise of power by Congress pursuant to the Necessary and Proper Clause is limited both by other express provisions of the Constitution and by the principles of separation of powers.

In Buckley, it was argued that officers of the Congress could, under the Necessary and Proper Clause, appoint commissioners of the Federal Election Commission, notwithstanding the fact that Art. II, § 2, cl. 2 of the Constitution placed the appointment power in the President. With regard to the relationship between the exercise of power under the Necessary and Proper Clause and other provisions of the Constitution, the Court stated the rule as follows:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in section 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

424 U.S. at 135.

The Constitution establishes the President's veto power as clearly as it establishes the appointment power or prohibits bills of attainder and ex post facto laws. Under Buckley, the only reasonable implication of the Framers' inclusion of Art. I, § 7, cl. 3, in the Constitution is that the Necessary and Proper Clause is not a source of power for evasion of these specific limitations through the enactment of legislative veto devices. I would add that, in reaching its holding in Buckley, the Court considered and relied upon earlier cases that seem most relevant to the constitutionality of legislative veto devices. In quoting from Myers v. United States, 272 U.S. 52 (1926), the Court

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5/ continued from page 6

or to a statute which is expressly or impliedly authorized by a provision of the Constitution. Thus, a source of authority for Congress to exercise power under legislative veto devices must be found in the Constitution in order for that authority to be recognized as legitimate. As we demonstrate below, the Necessary and Proper Clause does not grant such authority; nor does any other provision of the Constitution.

17

recognized the relationship between the grant of executive power to the President and the issue before it. 424 U.S. at 135-136. 6/ I believe that Buckley and the cases relied on by the Buckley Court foreclose arguments that the Necessary and Proper Clause grants Congress the power to provide for legislative veto devices.

Because to characterize the power exercised by the two Houses under § 1232(d) as "legislation" would necessarily require Congress to respect the President's veto power by presenting its resolutions for his approval, it is necessary for proponents of such power to deny that the power is "legislation" in the constitutional sense. They argue instead that the device is a means for Congress to oversee the execution of the law by the Executive, in aid of its undoubted constitutional powers to pass legislation and appropriations. Such an argument, however, cannot withstand scrutiny. Without a legislative veto, the regulations of your Department, unless invalidated by a court, would have the force of law. In depriving them of that force, the necessary effect of a legislative veto is to block further execution of a statutory program until the Executive

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6/ The Court went on, in holding the appointment of Federal Election Commission members by officers of Congress to be unconstitutional, to quote the following language from its earlier decision in Springer v. Philipine Islands, 227 U.S. 189, 202 (1928):

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. Myers v. United States, ...
>
> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the Executive.

promulgates further regulations in compliance with the current views of a Congress that may well be different from the Congress that enacted the substantive law. 7/ The difference between this kind of congressional "oversight" and the legitimate oversight powers of Congress in their effect on the constitutional allocation of powers could not be more profound. By its nature, for example, the exercise of a legislative veto would be beyond judicial review because the exercise of such powers could be held to no enforceable standards. In exercising its veto, I believe it clear that Congress is dictating its interpretation of the permissible bounds for execution of an existing law, a result that can be accomplished only by legislation.

The foregoing discussion demonstrates the flaw in the argument, occasionally made, that the doctrine of separation of powers protects the Executive Branch only in areas that are inherently executive, and that Congress may reserve to itself control over activities entrusted to the Executive which are not "truly" executive in nature. This reasoning overlooks the basic truth that there are few activities that are clearly executive, legislative, or judicial. The first two categories, in particular, overlap to an enormous extent. Much, if not indeed most, executive action can be the subject of legislative prescription. To contend, therefore, that Congress can control the Executive whenever the Executive is performing a function that Congress might have undertaken itself is to reduce the doctrine of separation of powers to a mere shadow.

The test is not whether an activity is inherently legislative or executive but whether the activity has been committed to the Executive by the Constitution and applicable statutes. In other words, the Constitution provides for a broad sweep of possible congressional action; but once a function has been delegated to the Executive Branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.

7/ In such a situation, the Executive, as a practical matter, may be giving up a measure of authority granted by the statute being administered which the courts in an appropriate case would have found to have been delegated to the Executive, if Congress had not intervened. Such a diminution of authority must, in my view, be viewed analytically as a repeal of the substantive statute to that extent.

2. Interpreting the Law

Section 1232(d) authorizes disapproval of a regulation by concurrent resolution if Congress "find[s] that the final regulation is inconsistent with the Act from which it derives its authority . . . ." That section, on its face, purports to vest in the two Houses of Congress an extra-legislative power to perform the function reserved by the Constitution to the courts of determining whether a particular executive act is within the limits of authority established by an existing statute. 8/ It is clear that the President constitutionally can be overruled in his interpretation of the law, by the courts and by the Congress. But the Congress can do so only by passing new legislation, and passing it over the President's veto if necessary. That is the constitutional system.

8/ The role of the Judiciary in requiring conformance by the two political branches to constitutional standards and in confining the Executive to execution of the law within the bounds established by statute is too familiar to require elaboration. It is therefore not surprising that the Supreme Court has consistently taken the position that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," thus denying any Congress any binding role in the interpretation of an earlier Congress' acts. United States v. Philadelphia National Bank, 374 U.S. 321, 348-49 (1963), quoting United States v. Price, 361 U.S. 304, 313 (1960). The Court, in taking this position, has recognized both the political nature of the legislative process and differences between the functional competencies of the courts and Congress. See United States v. United Mine Workers of America, 330 U.S. 258, 282 (1947). I note that in these three cases in which the Court cautioned against permitting the views of a subsequent Congress to influence interpreting the intent of an earlier Congress in passing a particular statute, the Court was faced with situations in which the subsequent expression of Congress' view came in the context of the passage of legislation. Thus, in those cases, even any marginal relevance of the subsequent congressional expression would have been subject to the President's veto under Art. I, § 7.

Proponents of the legislative veto, however, argue that such devices actually fortify the separation of powers by providing Congress with a check on an agency's exercise of delegated power. No doubt congressional review provides a check on agency action, just as committee review or committee chairman review would provide a check. But such review involves the imposition on the Executive of a particular interpretation of the law -- the interpretation of the Congress, or one House, or one committee, or one chairman -- without the check of the legislative process which includes the President's veto. In that case Congress is either usurping the power of the President to execute the law, or of the courts to construe it; or Congress is legislating. If it is legislating, the Constitution is explicit that the President must have the opportunity to participate in that process by vetoing the legislation.

II.

Because it is my opinion that § 1232(d) is unconstitutional, it is necessary for me to consider whether that provision is severable from the underlying grants of statutory authority upon which the regulations promulgated by you were based. Section 1232(d) was enacted in 1974. When the various authorities for the four regulations disapproved by Congress were enacted in the Education Amendments of 1978, Congress gave no indication that the substantive rulemaking powers delegated to you were to be extinguished if the legislative veto device in § 431 were to be found unconstitutional. Thus, I conclude that § 431 is severable from this basic grant of substantive power. *See*, *e.g.*, *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932), quoted with approval in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 108.

III.

Within their respective spheres of action the three branches of Government can and do exercise judgment with respect to constitutional questions, and the Judicial Branch is ordinarily in a position to protect both the Government and the citizenry from unconstitutional action, legislative or executive; but only the Executive Branch can execute the statutes of the United States. For that reason alone, the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt.

Any claim by the Executive to a power of nullification, even a qualified power, can jeopardize the equilibrium established by our constitutional system.

At the same time, the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other. In rendering this opinion on the constitutionality of § 431, I have determined that the present case is such a case.

Section 431 intrudes upon the constitutional prerogatives of the Executive. To regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality. 9/ More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the Executive Branch, as an equal and coordinate branch of Government with the Legislative Branch, to preserve the integrity of its functions against constitutional encroachment. I, therefore, conclude that you are authorized to implement these regulations.

Sincerely,

Benjamin R. Civiletti
Attorney General

9/ The history of so-called "legislative veto" devices, of which § 431 of the GEPA is one, illustrates the difficulty in achieving judicial resolution of such an issue. Although Congress enacted the first such mechanism in 1932, only a few reported cases have potentially involved the constitutional question inherent in the legislative veto, and a court has reached the issue only once. In Atkins v. United States, 556 F. 2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978), the Court of Claims held, four-to-three, that the provision of the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B), which permits one House of Congress to disapprove the President's proposed pay schedule under the Act, is not unconstitutional, and that the Senate's veto of a proposed judicial salary increase was therefore lawful. This Department, representing the United States, argued that the veto was unconstitutional, but that, because the veto authority was not severable from the remainder of the Salary Act, the plaintiffs had no right to additional pay. The latter view was sustained in McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

Other cases in which the validity of a legislative veto device has been argued include Chadha v. Immigration and Naturalization Service, No. 77-1702 (9th Cir., argued April 10, 1978); and Clark v. Valeo, 559 F.2d 642 (D.C. Cir. aff'd, 431 U.S. 950 (1977) (issue not ripe for determination).

STATEMENT OF JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL'S OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. **Harmon**. Mr. Chairman and members of the committee, I am here to discuss with you the Attorney General's opinion of June 5, 1980, directed to Secretary Hufstedler concerning the constitutionality of section 431 of the General Education Provisions Act.

That provision authorizes Congress by concurrent resolution to veto the final regulations promulgated by the Secretary of Education under that act.

It is my opinion and the opinion of the Attorney General that that provision is unconstitutional.

Chairman **Perkins**. Let me make this observation. We don't think your opinion is worth the paper it is written on. If we followed your analysis you could veto everything that the Congress of the United States did in the name of writing regulations and go far beyond the scope of the law.

The responsibility of the Congress as a separate branch of the Government is to legislate. It is not the responsibility of the Executive to legislate.

You people have just gone so far that you feel you are in the saddle, that you have the right to legislate and administer too. That is the weakness in your statement. We will carry this all the way to the Supreme Court in my name if nobody else's.

I have been around long enough to know how you have deviated in the last 20 years, and nobody can set themselves up in this Government as a dictatorship. That is just exactly what you people would be doing if this thing were tolerated.

I say that as an individual who has always had consideration for all the departments of Government. We don't intend to let this thing stand. You have usurped the rights of the Congress of the United States. Go ahead now with your statement.

Mr. **Harmon**. Mr. Chairman, I would like to respond because you have exactly identified the issue. The issue is the separation of powers. The dictatorship that you refer to, the framers provided a check against that. They provided you with the power—the Congress has the clear, unequivocal power—to override this regulation, to replace this regulation, to say there will be no regulation at all, to do away with the program.

I am not here to challenge that power because that power is clear, uncontroverted. But the principle of the way the Congress exercises that power is also uncontroverted.

The power of the Congress is exercised in one way and one way alone. That is by passing a bill by both Houses and then presenting that bill to the President for his approval or veto. That is a very fundamental principle. That is the basis for the Attorney General's opinion.

This is a Government of limited power and I concur wholeheartedly with the chairman's statement that there must be limitations on that power, both the power of the Executive to execute the law and the power of the Congress to make the law.

The Congress has the power to make law, but with presentation to the President for his approval or veto.

Chairman **Perkins**. I don't know whether you have taken time to examine the regulations that have been written by the Government. If you will examine the WPA statutes, they are very brief, they are just a couple of paragraphs, yet billions and billions of dollars were spent for the Public Works Administration. That is the way it was when I first came to the committee.

Nowadays you just get involved in writing regulations 15 and 20 times as long as the law itself and go so far off base you are just like a blind dog in a meat house wandering around.

If we let a new department start out like this, I think I would be derelict in my responsibility.

You place great emphasis on the constitutional provision that states all legislation passed by the Congress must be presented to the President for his approval or disapproval.

I think that what you are saying is that the Congress cannot adopt a concurrent resolution to disapprove the executive action. If this is what you are saying, that is contrary to previous Attorneys General opinion upholding the constitutionality of concurrent resolutions affecting the executive actions.

Second, I understand that you are saying that the Congress could disapprove regulations if the congressional veto were exercised by only one veto of Congress instead of by both.

Is that what you are saying?

Mr. **Harmon**. No; Mr. Chairman, that is not what I am saying. I am saying that Congress can exercise a veto of these regulations by a joint resolution, as simple as that.

The Congress has the unfettered power to step in and change this law, to change these regulations, to provide, as you pointed out, control, to take control. Congress has the power and had the power to write these regulations itself, but it determined that that was not a function that it could, that it had neither the time nor the facility to do that.

It delegated. It charged the Secretary of Education with the responsibility of writing regulations. It gave the power. It legislated.

At that point, then, it is the authority and the sole authority of the Executive to execute that law. That power is not unlimited. That power is subject to the very significant check, the check of the legislation of the Congress of the United States.

The power of the Executive is always limited by that check. The Congress can in fact determine that the Executive has wrongly interpreted its law, wrongly executed its law. But it does that in the constitutional means of passing legislation or passing a joint resolution.

This legislative veto is not a new idea. In fact, it was anticipated, it was contemplated by the Founders who sat down at Philadelphia in 1787 and wrote our Constitution, the provision that you just read, article I, section 7, clause 2.

Chairman **Perkins**. We can't understand why your opinion is so different from the previous Attorneys General who have ruled otherwise.

Mr. **Harmon**. Mr. Chairman, the Attorney General——

Chairman **Perkins**. We feel those were able men who adhered to the law much more strictly than politicians down there today adhere to the law. That is what we feel. That is the way we feel about it. Go ahead.

Mr. **Harmon**. Mr. Chairman, the previous Attorneys General have addressed this question and have addressed it since the administration of Franklin D. Roosevelt and have in each case found and opined that this provision, a legislative veto provision purporting to authorize both Houses or either House of Congress to veto an executive act, is unconstitutional.

Chairman **Perkins**. Even under the Carter administration, Griffin upheld the constitutionality of the congressional veto.

Mr. **Harmon**. Excuse me, Mr. Chairman. The Reorganization Act is different. That is spelled out clearly in the opinion. I will be pleased to provide the committee with a copy of Attorney General Bell's opinion on that in which he expressly and explicitly stated this legislative veto would be unconstitutional.

The Reorganization Act concerns an action not affecting the substantive rights of people, but in effect was legislation in reverse where the President's authority is preserved. He would not present a plan of which he did not approve himself. The authority of the President to apply this check on congressional action was there and, therefore, that provision could stand. That was carefully distinguished in the opinion from the substantive legislation before this committee.

Chairman **Perkins**. You are trying to say you can only do it in certain circumstances. You couldn't sell that to a court. Any reasonable court in this country would not buy that distinction.

Mr. **Harmon**. We are seeking the opportunity to sell that to a reasonable court in this country.

Mr. **Goodling**. I think what you have basically said since I have been here is that the power of the executive branch comes from the Congress of the United States in many instances.

I thought that was the point you were trying to make particularly in relationship to regulations.

I would then say that would mean also that the power to withhold some of those powers that are granted to you could be withheld by the Congress of the United States, such as vetoing regulations.

Mr. **Harmon**. I agree with every statement you made until the last sentence. I agree it is clear, no dispute, this Congress, this committee, can consider legislation addressing each of these regulations, all of the regulations or none of the regulations.

You can repeal the act under which the regulations are issued. You can write the regulations yourself. That is your undisputed power.

But there is a means, a way, that the Constitution provides that is to be done. That is to be done by legislation passed by both Houses of the Congress, submitted to the President.

Now, you are going to hear an argument. Mr. Gressman, Mr. Kennedy, will come and argue to you, quite ably, the argument they have presented many times before: Yes, there is this provision in this Constitution but there is another provision.

They rely on the necessary and proper clause. They say that, in fact, Congress has, through its determination in the exercise of its substantive legislative function and its appropriations function, its oversight responsibility; it can under the Constitution determine this legislative veto device is necessary and proper to the execution of that very important and fundamental function of the Congress.

But that argument has to fall in the face of the long line of Supreme Court decisions.

Chairman **Perkins**. I want to interrupt you again. You may be a very good lawyer but I can't go along with your reasoning. None of us is infallible. I think your analysis is just as far fetched as the Moon is from the Sun. I really believe that.

You operate only by delegated power, in my judgment. If you are saying Congress can only change regulations by passing a new law, then you are saying that the Executive has all implied power and that the Congress must withdraw this power.

That is not our constitutional system, in my judgment. I am glad we are here this morning. We are going to make some legislative history when this case does go to the Supreme Court. It is good for us to thrash this out.

Mr. **Harmon**. Mr. Chairman, I certainly agree, and I appreciate the opportunity to discuss and debate the issue with you.

The delegated authority of the Executive—you see, there are several articles in the Constitution. Article II grants to the Executive the exclusive authority to execute the law, to carry that law into effect.

Your disagreement with the Attorney General and with me must also include a disagreement with James Madison because it was James Madison who brought this up on the floor at the Constitutional Convention immediately upon the adoption of article I, section 7, clause 2, which reads, "Every bill which shall have passed both Houses before it shall become law shall be presented." He said that surely the able minds and strong wills of the people who will make up the Congress of the United States in the future, will certainly have the fertile imagination and thought to read that provision and seek in fact to evade this check on their power—because it is the only check on their legislative power—by passing actions, calling them concurrent resolutions, calling them votes.

He insisted upon the addition which was adopted and included as the next clause in the Constitution:

> Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary except on a question of adjournment, shall be presented to the President of the United States.

That is the text, the face, the history of the Constitution. It is my position, the position of the Attorney General, that this legislative veto device was contemplated by the Founders of the Constitution and prohibited in the very text of the Constitution.

Another argument that you will no doubt hear is that, well, this legislative veto is not really changing the law because this regulation really had not yet become law because in fact the legislative process is not finished until the regulation comes and is presented to the Congress and lies before the Congress for 45 days in this instance.

Mr. **Ford**. Who makes that argument?

Mr. **Harmon**. I am anticipating.

Mr. **Ford**. Don't make our argument for us. That is insulting. You are having an argument with yourself. Don't leave the impression somebody from the Congress has advanced that kind of theory, because no one has.

Mr. **Harmon**. To make the point, a Representative of the House of Representatives did make that argument. If that is not of interest to the committee, I will entertain your questions.

Mr. **Goodling**. I have a few comments.

I notice in the letter the Attorney General said, "Without a legislative veto the regulations of your department, unless invalidated by a court, would have the force of law." So I have some problems with that.

The second comment I would make is we have a legislative veto provision in our youth bill. I don't know whether that is going to cause any problems.

Third, a question I would ask: Is the Attorney General and the President actually seeking a court test on this?

Mr. **Harmon**. Yes; we are. We have a case and the House and Senate have been represented by Mr. Gressman and Mr. Kennedy in that case. One case has been argued in the Ninth Circuit. That was argued 2 years and 4 months ago and we are still waiting for the decision in that case.

We hope that case will present the vehicle for the Supreme Court consideration of this issue; yes, we are actively seeking cases.

Mr. **Goodling**. Confrontation.

Mr. **Harmon**. Not confrontation but a case. Under our constitutional system where there is this difference the Constitution provides the Supreme Court.

Chairman **Perkins**. Mr. Erdahl.

Mr. **Erdahl**. Thank you, Mr. Chairman. Obviously, we are involved in some confrontation in a very controversial case to decide, those of us who are elected to be policymakers and those who have been appointed to be administrators. Where is that line of demarcation?

Unless I misheard you, you seem to say that since Congress delegated the power, we do not have the right to come back and reclaim it. In layman's terms, once the cat has escaped from the bag, we in the Congress can't stuff it back in again.

Mr. **Harmon**. No. You have the ultimate power. The Congress of the United States can correct, can undo——

Mr. **Erdahl**. Maybe Mr. Perkins does.

Mr. **Harmon**. I will address my response to the chairman.

This is the ultimate power, to come again to this issue, to reconsider and redo—not only to block or veto but redo and remake in detail—only within the constraints of the Constitution. That is your power.

But the only check on that power, the only check, is that you exercise that power subject to the presentation to the President of the United States.

I will argue long and hard for your power to revoke this regulation by legislation.

Chairman **Perkins**. As I understand it, he is arguing that they can do whatever they want to by writing regulations unless the Congress rewrites the law to forbid them from doing it. Is that what you are arguing?

Mr. **Harmon**. I am arguing——

Chairman **Perkins**. Let's narrow it down and not jump all over the lot.

Mr. **Harmon**. Mr. Chairman, the argument is when the law is passed by the Members of the Congress, signed by the President or repassed over his veto, there is the law, and the Constitution—not a statute but the Constitution—places the responsibility on the President and his delegate, the Secretary of Education, to apply that law consistently with the law, with their interpretation of the law.

If a private party disagrees with that interpretation, he can carry the Secretary to court. They have and will in the future. The court will arbitrate in fact whose interpretation is correct. If the Congress disagrees with that interpretation, the Congress, quite simply under our Constitution, shall pass a law by both Houses—submit it to the President and it is changed and the Congress has the control.

Mr. **Ford**. You are fascinating me with that kind of argument. What you're saying would sound really great at a cocktail party. It doesn't make any sense in this city, because a lot of things have happened since Mr. Madison did his writing.

The balance of power between the branches of government exists with checks. You are quite eloquent about how limited those checks are—the same way the balance of power exists between us and the Russians on the nuclear weapons.

The reason it works as a deterrent is nobody is willing to see what happens if we push the button.

In the history of this country nobody in the executive branch has wanted to even try to push the button to see if we had a nuclear exchange who comes ahead. In your zeal you are going back to what existed before the amendments in 1974, and you people seem to be caught up with the idea Congressman Levitas has invented something new since he arrived from Georgia and that is what you have to react to when he only reinvented a wheel that has been turning on our buggy for many years.

In 1974, we amended the law in this committee because this committee was having trouble with HEW which at that time had a new Secretary every few months. He took the attitude that since the executive branch was headed by a different party that they really were elected to run the country and then started changing the directions of the laws this committee had written.

We were the first committee of the Congress, joined by our counterparts on the Senate side, to say, look, if you are going to write regulations that have the effect of changing the intent of our great wisdom as incorporated in the statute, then we are going to have a closer look at them.

You are suggesting that instead of taking that route, we should have continued the pattern that had been previously developed, and in fact, here is what was developing: The Secretary—if we followed your suggestion—in 6 months would have no discretion left. Every single piece of legislation that comes through here would have somebody else's idea of how to tie the Secretary's hands so that he or she would have no discretion.

That was what was happening from 1969 to 1974 and we realized that the kind of confrontation that you and the Justice Department are now urging upon my administration was producing a stalemate for the Nixon administration that they were losing.

They were losing in the sense that every committee around here was tying down every member of the executive branch so they couldn't do a damn thing except add two and two and always come out with four.

That is no way to run a Government because people are at the Cabinet level on the presumption that they are going to assist the President of the United States in executing the laws and applying some kind of discretion. This committee and other committees can write legislation that leaves no discretion to the Executive and if you want the executive branch to simply be messengers who carry money back and forth after a computer determines where it shall go, legislation can certainly be written that way.

There is no one of any political persuasion from the extreme left to right of the spectrum who wants to be responsible for that kind of interference with the inherent flexibility that the Executive has to have to function.

But the kind of confrontation that you are advocating this morning will be resolved in a very simple way. I don't have to guess at that. It doesn't matter whether it is President Carter or someone else who might be elected in his place. The result will be the same.

Our administration tried to play a little loose with regulations with a Congress which happened to be from the opposite party. But I don't think this Congress would hesitate to do it to a President and his Cabinet from the same party. That would, in my opinion, lead to some pretty lousy law.

When I came down here there was a great fellow in this town named Dr. Wilbur Cohen (former Secretary of HEW) who said to me, when you are writing education legislation remember one thing, that a perfect law purely administered isn't worth a damn. You can pretty much write anything. If it is administered properly, it will get the job done.

It has been the tendency on this committee to write legislation to give people who are going to administer the law as much discretion as we can as long as it is consistent with fiscal and philosophical integrity to do what makes sense. Because what makes sense in 1 of the 50 States and 6 territorial jurisdictions may not make sense in others. But if we find ourselves pinned down with your kind of interpretation, neither this committee nor other committees are going to be able to do that because most of us are not going to trust a Secretary, or the kind of people who get jobs as regulation writers for Secretaries, to interpret our law.

We will do it and you will see statutes coming out of here, which instead of 20 pages long, will be like Sears, Roebuck catalogs.

That is not good for the country; it is not a good way to administer the law.

I hope that somebody—either you or between you and Civiletti over there—is stopping to recognize that the Attorney General of this country has a practical responsibility to abide by the traditions and checks and balances that have existed as much by tradition as by rote. Don't try to tell us what Madison really meant. We have constitutional students around here who will argue those points forever more.

We haven't time to argue those points. We have a country to run, a country with problems. We have a President who wants to get programs in place and wants to solve those problems.

You can't put that President directly or indirectly—or any President—as the Attorney General is trying to do, into the position of a direct confrontation over a civil issue like this, for the benefit of what—the ego of a few people who wrote regulations and felt offended when we turned them down?

What are we talking about protecting here, the country or a few bureaucrats down there?

I am still close to a rage when I look at the advice that was given to the Secretary of Education, of all people, who heads the one place where this system has worked for years. We threw the regulation review amendment at a President when he was under threat of being impeached and he accepted it when he was asserting executive privilege for everything you could possibly imagine.

Now you are telling our Secretary that she ought to be the cat's paw to make a test. Just as one lawyer to another, if you are looking for a place to test, you have picked the wrong place. This is not Mr. Levitas' baby here. This is one that has been accepted by three succeeding administrations, two very antagonistic to the people who wrote that opinion. And you have a long history of really tough guys over there at the Justice Department accepting it.

For my administration to be saying our cabinet should be confronting a Democratic Congress over who crossed the "t" and dotted the "i" is sheer nonsense and extremely naive, and, to me as a Democrat, somewhat embarrassing.

I hope there are some Democrats over there and Americans who have some sense of something besides the technical nuances of this whole argument.

What is important here is what kind of laws we end up with and whether they are going to be administered and how.

If you people over at Justice persist in the cause that you now seem to be embarking on, you may be responsible for creating a war between two members of the same family that will do permanent damage to the traditional separations that were contemplated by the Founding Fathers but not spelled out in as much detail or with painful finite precision that some lawyers apparently, like yourself, seem to try to find.

The beauty of this system is that a good deal of what makes it work is not to be found by checking every last little period and quotation mark in any written document. It has evolved from a long period of respect which creates a custom that makes it work.

The Court is not anxious for an Attorney General or anybody else to figure out a way to get this body and the executive branch in a fight over in that Court because the Court is not at all inclined to be in the middle of that kind of family fight unless it absolutely has to be.

I just hope that somebody over there will take a look at what you are doing. What are you trying to accomplish? Are you trying to prove that you are technically right or trying to accomplish something that is for the good of the country?

Give me the "good government" explanation, not the technical, legal explanation. Tell this commmittee how life will be better for Americans and how the President will be able to function more efficiently through his executive branch if your technical interpretation is to be followed.

Chairman **Perkins**. Before you answer, I am going to interrupt you and let Congressman Levitas testify at this time.

[The prepared statement of Congressman Elliott H. Levitas follows:]

PREPARED TESTIMONY OF HON. ELLIOTT H. LEVITAS A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, and other distinguished members of the Subcommittee, I appear here today to comment upon the actions of the Secretary of Education relating to the four resolutions of disapproval of Department of Education regulations. After both Houses of Congress passed these four resolutions, the Secretary of Education decided that she would disregard them. In effect, this has meant that the Secretary of Education refuses to obey the law.

Now, the background of this is very simple. Congress passed a law which the President signed, saying that when regulations are promulgated by the Department of Education, they come before the Congress for review. If Congress, by adopting a concurrent resolution of both Houses, vetoes those regulations, those regulations become null and void and cannot go into effect. The law is very clear. The law is very simple. The law is very explicit. It says that where both Houses of the Congress have adopted a congressional veto, the regulations become null and void. Congress recently vetoed four sets of regulations proposed by the Department of Education. In response, the Administration, through Attorney General Civiletti and Secretary Hufstedler, announced their decision to ignore those vetoes. I do not believe any Member of Congress can stand by and allow our mandates to be treated in such a cavalier fashion. The Constitution of the United States requires the President of the United States to faithfully execute the laws. He is not given the authority to pick and choose those laws he wants to implement and those that he does not want to implement.

My amendment to the reorganization legislation last year made the Department of Education the first Government agency to be established from the outset with a legislative veto provision on all of its rules and regulations. The Department of Education promulgated regulations dealing with the Education Appeal Board, the arts-in-education program, the law-related education program of the Elementary and Secondary Education Act, and aid to the states under Title IV of the same statute. The regulations exceeded statutory authority to such an extent that they served to rewrite the law that had already been written by the Congress and signed by the President. When this became apparent, the Chairman of this Committee (and of this Subcommittee), my distinguished colleague from Kentucky, sent letters to the Assistant Secretary of Education in which he pointed out these inconsistencies. When the regulations were issued in final form, it became obvious that the Department of Education had chosen to ignore the comments of Chairman Perkins. This subcommittee then responded with four concurrent resolutions of disapproval, which were subsequently passed by both Houses of Congress.

After both Houses adopted the concurrent resolutions of disapproval pursuant to the statute passed by the Congress and signed into law by the President, the President chose to ignore the law. Acting on behalf of the President, Attorney General Civiletti issued a formal opinion in a letter to Secretary Hufstedler, saying that she was free -- perhaps, directed -- to ignore the concurrent resolution of both Houses of Congress, despite what the law said.

The Attorney General stated the official position of the Executive branch that the law was unconstitutional and should therefore be disregarded. But it is not the prerogative of the Executive branch to pick and choose among the laws they will choose to obey. The Executive branch in general, and the nation's highest law enforcement officer in particular, has the responsibility for the constitutional obligation of the President "to take care that the laws are faithfully executed."

Now I want to make it very clear, I know President Carter and I have great respect for him; and I know him to be a law-abiding citizen. Unlike other Presidents in recent history, I think that President Carter would not deliberately violate the law, and I reject any interpretation or insinuation that the actions taken and announced by the Justice Department in this matter, or the Department of Education, as yet amount to a deliberate violation of the law. Indeed, I think it is a situation of inadvertance, of error, and a failure to focus upon something that is very fundamental. If there is a constitutional problem with legislative vetoes, let the courts decide it. Let the Supreme Court make the decision.

The fact of the matter is that every court which so far has considered the issue of validity of congressional veto has in fact upheld it. Perhaps the most meaningful statement on the subject was a concurring opinion by Mr. Justice White in the famous case of Buckley versus Valeo, which I know the distinguished Members of the Subcommittee are familiar with.

In this particular instance I might point out that the Justice Department itself, by opinions issued by prior Attorneys General, has stated that in the exercise of a congressional veto, in many instances the adoption of a concurrent resolution is not required for presentment under the presentment clause. But, what is in the Constitution without a doubt and without challenge is the requirement that the President of the United States faithfully execute the laws of the United States; and the President cannot pick and choose those laws he wants to implement and those that he does not want to implement.

It is not for the Executive branch to decide what laws will be enforced and those which will not. There is a very important case that illustrates that, Kendall versus United States, decided by the Supreme Court in 1838. In that instance, the President of the United States directed his Postmaster General not to pay a certain sum required to be paid by Congress to a contractor with the Post Office, and in issuing the writ of mandamus the Court said:

> To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.

No, the President of the United States does not have the power or the right or the prerogative not to enforce the laws. That is for the courts to decide, and not the President. In this case, the law under which the concurrent resolutions were adopted was legislation, which was signed by the President of the United States. The President signed the law. He should enforce it.

On the basis of the Attorney General's opinion, Secretary Hufstedler announced that the Department of Education would continue to enforce the vetoed regulations, as if Congress had done nothing. Within a week of this decision, on June 12, most of the members of this Subcommittee and a majority of the membership of the full Committee signed a letter to Secretary Hufstedler which condemned her decision as an irresponsible and arrogant course of action. As the members of the Committee said, this was a sad way for the new Department of Education to begin its operations.

Since that time, I have offered amendments to appropriations bills which fund activities which are subject to legislative vetoes. The amendments prevent the use of funds for implementation of regulations or actions which have been expressly vetoed by Congress. I think that all of us must unanimously be in accord that once a veto has been exercised, that regulation is disapproved, and we should not fund the Administration to implement disapproved or vetoed regulations. Certainly, a majority of the Members of the House agree, as we have passed on voice votes my amendments to H.R. 7584, the State, Justice, Commerce Appropriations bill, H.R. 7583, the Treasury-Postal Appropriations bill, and H.R. 7998, the Labor, Health, Education Appropriations bill. Because we added this amendment to the last bill, which specifically referred to the Department of Education regulations which were disapproved by Congress, no funds will be appropriated for fiscal year 1981 to aid the Department in breaking the law.

After I first announced my intention to introduce such amendments to appropriations bills, Secretary Hufstedler attempted to soften her stance on the issue. On June 26, she stated that the Department would continue to disregard the resolutions of disapproval as unconstitutional, but would begin a process of review of the regulations which were vetoed. I am sure that the distinguished Members of this Subcommittee will agree that this is not enough. We must have an Administration that respects the law of the land, as passed by the Congress and signed by the President. We must have some accountability for the unelected bureaucrats who develop these rules and regulations. The congressional veto provides this check, but the Administration has refused to acknowledge the fact that it exists. The Administration believes that there are constitutional problems with the legislative veto, but more than a majority of the Members of this House have registered their disagreement by joining me as cosponsors of my comprehensive legislative veto proposal, H.R. 1776. We must continue to let them know that we, the Congress, will not accept this position. We must use the powers that we have in the Congress to develop authorizations and appropriations for the agencies. We must never let up in our resolve that the law shall be made by the people, through their elected representatives in Congress, and not by the unelected bureaucrats.

STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEVITAS. Thank you. I hope you will forgive me if I say facetiously I feel like Christ between two thieves—but I am just being facetious.

Secretary HUFSTEDLER. I prefer a rose between two thorns.

Mr. LEVITAS. And I appreciate the opportunity for being able to present a few words about this issue today. It is a matter which I have discussed with the President in the past, with the former Attorney General and with John Harmon, and I have also had discussions with Secretary Hufstedler about this issue. It is an issue that has to be addressed.

I want to commend this committee because, as Mr Ford was saying earlier, you in many ways have taken the lead in the practical utilization of this mechanism, which seems to have been working well heretofore. I think it is regrettable that we came to a situation which was precipitated by the opinion of the Attorney General and the subsequent memorandum issued by the Secretary.

The issue, as I see it, is not whether the legislative veto mechanism is a wise idea or a good policy, or whether it is even constitutional. That is not the issue.

The issue is a clear one that where there is a provision for a legislative veto in a law which has been signed by a President or passed into law over his veto, and that mechanism is in place, and that mechanism is utilized, it is totally inadmissible for any President to say he is not going to obey that law.

Presidents cannot pick and choose laws they are going to obey and those they are not going to obey. That is a very simple proposition.

Mr. Miller of California may totally disagree with a legislative veto as a wise or even a constitutional mechanism. But if it is part of the law and that law is exercised, he can't say we are not going to obey and follow that law.

I will acknowledge the fact that there could be extreme exceptions to that principle I just stated. For example, if Congress passed a law that said black children could not attend the same schools as white children, I don't think a President would be required to enforce that law, although I think it would be held unconstitutional even before it got to that point.

But there has already been Supreme Court adjudication of that specific issue. That is not true in the case of legislative veto. In fact, the only statements made by the Supreme Court, in the way of dicta, were made by Mr. Justice White in the *Buckley* v. *Valeo* opinion, and he used expressions which indicated that it is clearly a constitutional mechanism.

In addition to that, every single decision which has involved the legislative veto mechanism up to this point has held it to be a constitutional exercise.

In light of that, for a President to say, "I am not going to recognize the law that has been written into the statute books, it has been signed by the President but I am just not going to enforce that one," is an attack on the entire system of government. It is as fundamental as that.

I think Mr. Ford is absolutely correct when he says it is almost embarrassing to find this type of confrontation between a Democratic President and a Democratic Congress after the experiences of the preceding years.

Mr. Chairman, I think that if this situation had occurred in a prior administration, the remedies that would have been pursued by the Congress might have been more than what we are now pursuing, which is cutting off appropriations.

I think there might have been Members of Congress who would have felt there were more severe sanctions that should have been exercised because a President under the Constitution has the responsibility of faithfully executing the laws. The courts are the arena in which their validity is to be tested.

There was a case which I have referred to in my written statement which I hope will be made part of the record—*Kendall* v. *United States*——

Chairman PERKINS. Without objection, it will be made a part of the record.

Mr. LEVITAS [continuing]. In which President Jackson, I believe, did not want to obey a particular law that Congress had passed relative to payment of a postal contract. As the matter got to the Supreme Court under a mandamus action requiring the postmaster to make that payment, the Court said that under the constitutional provision giving the President the mandate to faithfully execute the law, it would be a strange proposition indeed to say that he could, by the same mandate, decide not to enforce a law with which he happened to disagree.

I think that is what we have here today. I think these oversight hearings are extremely important. I think it is a sad commentary, a tragic commentary on the judgment, both political and constitutional, of the people who brought us to this crossroads.

This is a major national constitutional confrontation which should not have occurred. If the administration did not like this law, there is a courthouse down the street where it could be tested. They don't have the right and they cannot be so arrogant as to assert they are not going to enforce laws because they don't like them. I think that is the issue.

I think we need to go forward with the efforts to remove appropriations where there have been vetoes of regulations. The recent decision in the abortion case clearly confirms the fact that only Congress can appropriate public funds and that must be the remedy we pursue.

I appreciate the opportunity of having the chance to express these views and would be happy to respond to any questions.

Chairman PERKINS. Mr. Ford.

Mr. FORD. I would like to compliment the gentleman who has been the one person in the Congress who has persisted in an attempt to make the principle which originated in this committee applicable to other appropriate Federal departments. I doubt anyone in the Congress has spent as much time on this subject as you have and studied it as carefully.

In your knowledge, with these provisions in the Education Acts and/or any comparable GEPA provision, have we had to resort to a court test in the 10 or 12 years they have has existed?

Mr. **Levitas**. There have been several cases that have gone to court involving the legislative veto mechanism. None that I am aware of resulted from the application of the GEPA provision. I think, as I alluded earlier, this committee and the former Department of HEW had worked very successfully in applying this mechanism, and I think that probably is the reason there was no court test.

There was a case involving the legislative veto mechanism in the situation of a Federal pay system, the *Atkins* case. There was a case in which the issue was raised under the Federal election law, which was *Buckley* v. *Valeo*, but this case was decided in the Supreme Court on other grounds, and there was only dicta relating the constitutionality of the legislative veto.

Mr. **Ford**. In the first instance, I think the suit was brought by a group of Federal judges and the base of that suit was a question of whether an action by the Congress to interfere with the executive's recommendation with respect to pay might not be violating the separation of powers because it would be an indirect way in which we could violate the provisions of the Constitution designed to keep the Congress from influencing the Court.

We were very anxious that the judges prevail in that suit. I was the chairman of the ad hoc committee which was considering pay raise legislation during that period.

Second, in the *Valeo* case there was the problem of the legislative branch appointing people to an executive position which involved a different dimension than the question of interpretation of a statute or requiring the executive branch to do something as a condition precedent to executing the statute.

Mr. **Levitas**. I think your explanation of the *Buckley* case is correct. As I recall the Court of Claims opinion, in the *Atkins* case, they did in fact reach the issue. They narrowly decided it but they decided.

Mr. **Ford**. The original statute provided that Congress would appoint members.

Mr. **Levitas**. That is in the *Buckley* case.

Mr. **Ford**. Right. There was a confirmation proceeding and so on.

Mr. **Levitas**. That is right.

Mr. **Ford**. The real problem that the court found there involved whether or not they were going to be an executive agency with a legislative composition.

Mr. **Levitas**. That is correct. And they said it would be improper to have legislatively appointed members of an independent commission of that sort.

There was another case also under the Pay Act, as I recall it, involving Senator Pressler who brought the action. There was a case which was about to be decided, and my own interpretation is the Justice Department copped out on it, involving the Nixon papers, which I thought would have raised the issue.

There is an immigration case pending now in the ninth circuit, a case which involves a legislative veto but I don't know how that is going to come out. I don't think it will reach the issue.

Every time the issue has been reached, though, or has been raised, so far as I am aware, it has not been held to be unconstitutional. There are, as you might imagine, literally mounds of scholarly articles on both sides of the issue but as I have said before this constitutional issue is not going to be decided by the law professors, not decided by me or you, it is not even going to be decided by the President of the United States or his Attorney General.

It is going to be decided by the Supreme Court. That is where we ought to be, not having an administration stonewalling an act that is on the statute books which is presumptively constitutional.

I will tell you how bad it is. The Justice Department, when this issue was raised in a court, conceded it is unconstitutional. They don't defend it. They are supposed to defend and uphold the statutes. They go into court and if the plaintiff alleges that the legislative veto provision is unconstitutional, they throw in the towel and concede that. They are not defending it.

So what we had to do was amend the Justice Department authorization to say that when the Justice Department refuses to defend a statute of the United States, they have to notify Congress. We then appoint our own counsel to go in and defend that statute so it will at least have a lawyer. The Justice Department can thereafter in those proceedings no longer claim to be representing the United States with respect to this issue.

That is how bad the situation is. Hopefully, we will get a Supreme Court decision on it.

I think it is too bad that the Justice Department felt that they didn't want to go forward with the Nixon papers case because I thought that would have been perhaps as clear a question on the legislative veto as possible.

Interestingly enough, just to take another point, the reason that case became so important is it involved two exercises of a legislative veto. One is by the House and one by the Senate with respect to regulations relating to the custody of the Nixon papers. It was a case in which a legislative veto had in fact been exercised. So it would have been a good test.

Mr. Ford. Thank you.

Chairman Perkins. Mr. Goodling.

Mr. Goodling. I have nothing to add at this point.

Chairman Perkins. Mr. Miller.

Mr. Miller. I have no questions.

Chairman Perkins. Mr. Erdahl.

Mr. Erdahl. Thank you, Mr. Chairman.

Thank you for being with us today, Mr. Levitas. Before you came in—and Mr. Harmon, correct me if I, as a layman, misinterpreted your presentation to me—my understanding is that the Justice Deprartment does not dispute the right we have as Members of Congress as policysetters.

If an agency goes beyond the parameter as we interpret it of the statute we have passed and promulgated, the rules and regulations, we have the right to reclaim that by passing a statute signed by both bodies, signed by the President. That is the mechanism.

My understanding is your contention, Mr. Harmon, is this the only way we can do that and not by the exercise of a one- or two-House veto that would not involve a signature of the President.

Mr. Harmon. That is correct.

Mr. Erdahl. Would you care to comment specifically and briefly on that?

Mr. **Levitas**. Yes. I just happen to totally disagree with Mr. Harmon in that regard. I respect his legal position on the matter but I would get back to the point that I may be right, he may be right. The final decision as to who is right on this constitutional issue will be issued by the Supreme Court and until that is forthcoming a statute passed by Congress is presumed to be a valid exercise.

In fact, the reorganization legislation which created the Department of Education took the GEPA provision, expanded it into other areas of regulatory action by the Department of Education, and that bill was signed by President Carter.

If they thought it was unconstitutional what should he have done? He can't sign it one day and not endorse it the next day.

Mr. **Erdahl**. Who advises the President on the constitutionality of bills he ought to sign or veto? Isn't it the Justice Department, perhaps?

Mr. **Levitas**. I would suggest more specifically it is the Office of Legal Counsel.

Mr. **Erdahl**. Of the Attorney General?

Mr. **Levitas**. Yes. I don't know whether they advised him to veto that bill or not. Obviously, he didn't follow that advice.

Mr. **Erdahl**. I have no further questions, Mr. Chairman. Thank you very much.

Chairman **Perkins**. Mr. Biaggi.

Mr. **Biaggi**. I have a series of questions.

I thought Mr. Levitas' presentation was excellent and clarified it. We are right at the crux of the problem. What concerned me really was the position of Justice conceiving a question that they should be advocating. That pretty much communicates the state of affairs and where the problem may lie.

I ask this question of Mr. Harmon. Do you believe the General Education Provisions Act was validly enacted?

Mr. **Harmon**. Yes.

Mr. **Biaggi**. Was it validly introduced, reported by committees, handled by both bodies, engrossed, presented to the President, and signed?

Mr. **Harmon**. That is right. It is conclusively presumed to be so on signature and entry by the President.

Mr. **Biaggi**. When the General Education Provisions Act was validly enacted, its interpretation pertaining to constitutionality came within the province of the judicial department. Yet the Justice and Education Departments have made a judgment on its constitutionality and decided to ignore its provisions.

Give us the citation for the executive authority to judge the basic constitutionality of a statute.

Mr. **Harmon**. The Constitution gives to the executive that obligation. The President takes an oath of office to faithfully execute the laws and that includes the Constitution of the United States; and that authority came not from the statute, but from the Constitution.

Mr. **Biaggi**. That is the question. We suggest that it belongs in the Supreme Court.

What I am asking is what citation permits you, to give us the authority to base the constitutionality? Is there a citation?

Mr. **Harmon**. If I may respond, this, I think, will help answer the point made by Mr. Levitas as well.

There was a Supreme Court case—I will call it *Lovett*—that presents a situation in which President Roosevelt, during the war, was presented with a statute, an appropriation to continue the war effort, appropriating money to buy defense materials that he had to have.

Tacked onto that legislation was a provision declaring that four occupants, officers in the Department of State, should not receive their salary, that they were assumed to be guilty of an offense against the state and their salaries should be withheld.

President Roosevelt signed that law. He had to sign that law. He noted that he believed that that provision was a bill of attainder, that it was unconstitutional but that he had to carry out a war.

The case then came to Court. The Department of Justice—that Department of Justice—went into court, notified, as this Department has done in each case, I hasten to add, the House and the Senate, that the President's position had been and was that the law was unconstitutional and that he would so state in court.

They invited the House and the Senate to be represented by counsel, as we have done consistently even prior to the provision Mr. Levitas referred to. Positions were presented. The Supreme Court agreed with the President's interpretation of that law. And the Court carefully treated in a footnote the point that in signing that law, no President can waive a power of the office. The constitutional provision could not be waived by signature of the President. That is the principle and the authority which I would cite in response to your question.

Mr. **Biaggi**. You just made my position and Mr. Levitas' position sound. It was the Supreme Court that made the decision.

Mr. **Harmon**. If I may respond.

Mr. **Biaggi**. Sure.

Mr. **Harmon**. Mr. Levitas and I are friends, we talk about this over cocktails, we talk about it in conferences, we talk about it in many places.

The point is that Mr. Levitas would have it both ways; that is, he insists that the proper forum to decide this question is the Supreme Court, yet he insists at the same time that the President must acquiesce in the dissolution of his authority and, therefore, eliminate the possibility of a court challenge or test because if the President does accede to the removal of his authority to grant pardons, if legislation is passed, and he does not grant a pardon, or here in this case if he accedes to the authority of the Congress there could be no court test. This is a narrow, I agree entirely, realm of cases, separation of powers cases. The President enjoys no power of nullification. We do not assert a power of nullification here. But we do assert under the Constitution a right of self-survival.

Chairman **Perkins**. We are going to interrupt you for 10 minutes. We will vote and come back within 10 minutes.

[Brief recess.]

Chairman **Perkins**. Mr. Corrada, do you have any questions?

Mr. **Corrada**. No.

Chairman **Perkins**. Mr. Simon?

Mr. SIMON. Mr. Chairman, I happen to have voted against Mr. Levitas on his provisions but it seems to me that what he has to say here makes a great deal of sense and that when you pick a constitutional issue, you pick it on firmer ground than the one the Attorney General has selected here.

The second point I would make is that in this whole area we simply have to exercise commonsense. Here, as I have read the statement of the Secretary, you have done precisely that. You are trying to exercise some commonsense.

What we have to avoid is the situation where we needlessly have confrontation. It just seems to me that the Department of Justice has been ill advised to move ahead with confrontation on this matter.

I have no questions, Mr. Chairman. I just have that comment.

Chairman PERKINS. Before I call on Mr. Petri, I want to ask Mr. Harmon who actually wrote the opinion that was delivered to Secretary Hufstedler?

Mr. HARMON. Mr. Chairman, that is the Attorney General's opinion. It is his signature there at the bottom.

Chairman PERKINS. I am asking you who actually wrote it?

Mr. HARMON. I assisted the Attorney General in the preparation of that opinion.

Chairman PERKINS. That is all.

Mr. Petri.

Mr. PETRI. Thank you, Mr. Chairman.

I am disappointed the Attorney General is not here. It is his opinion, and I think it would be helpful if he were here to hear firsthand the views of the members of this committee and the Congress because the issues are those of judgment as well as of a technical nature.

I want to thank the chairman for having the hearing and associate myself with his comments and also particularly my subcommittee chairman, Bill Ford's comments. I think they are very well taken and very wise.

Chairman PERKINS. Will the gentleman please yield?

Mr. PETRI. Yes.

Chairman PERKINS. I want to congratulate the gentleman because he was the one who addressed the letter to me requesting the hearings.

Mr. PETRI. I want to underline that this is not in any way, so far as I am aware—and I think I am speaking accurately—a partisan political thing at all with this committee or with this Congress.

I think we are trying in a serious way to do what is in the best interest of the country and the constitutional form of government that we have in the long term and that we sense a drift toward bureaucratic arrogance which we must correct in some way or another and at the same time regulate properly a complex society.

It is not an easy thing to address.

I would like to ask now that we have had a pause, if you have a response to the question Mr. Ford left you with at the end of his statements which is what is the good government argument for this position rather than all the technical things.

Mr. HARMON. I would like to respond to that question, with your permission, Mr. Chairman, because I think so much of what Congressman Ford had to say, with which I cannot disagree, that this has to be the structure of government in terms of—in fact, that is the structure that was contemplated, that Congress would make the general decisions, give the general direction, but that there would be, of course, a discretion as there is in prosecution decisions on a daily basis. But that discretion must be vested in a responsible administrator, responsible to the law, responsible to the Congress and responsible to the Constitution.

The good government point, I think, was exactly what the President addressed in his letter to the Congress of June 21, 1978, when he wrote to the Members of Congress and said that this is a problem.

He identified again several good government points, as you put it. First, that the legislative veto is a quick fix, that it enables or at least gives the illusion of being able to finally bring the bureaucracy under control, to take a hand in these regulations, that there is a shortcut way to get there without looking at some of the fundamental decisions that are being made and the responsibilities that are being set out in legislation.

He asked the Congress to do what this committee did and what the Congress did in this case, that is, to consider a resolution, as you did here, pass it by both Houses. But the extra step, the one step that he must insist on is the presentation to the President for his approval or veto.

When you make the point that, goodness, we have to have a means of doing this and it is a laborious means without this legislative veto device, my response is, this is the case in point, that it was not burdensome, this committee was able to do exactly what it was required to do, even to exercise its legislative veto. That is, the Congress considered the question, it passed by a majority of both Houses, and then the next step was skipped. In terms of interference with the Congress operations and its ability to take this action, the action in fact was taken.

But the next step, the step required by the Constitution of submitting the law, the resolution, the joint resolution, to the President, for his approval or veto, was not complied with in this case.

The President is not seeking confrontation, obviously. He is a President with a majority of his party in the Congress. He is working for accommodation on every front. He feels, as he stated in this letter, very strongly that he has a duty not only to his party but a duty to the office that he holds, to the Presidency, to preserve this constitutional system.

Mr. Levitas pointed out that, well, we ducked the issue on the Nixon papers regulations. There were three sets of regulations written over 3 years, debated back and forth and in fact GSA did what Mr. Levitas advocates to be done here, GSA accommodated and changed the regulations. There was no veto. There was no possibility for a court challenge.

That is also the point. We have a system of two separate and supposedly coequal branches, made coequal by this system of checks, the checks that one branch exercises over the other. That is a check again that the President feels can be accommodated and still accomplish what he, I am sure, would endorse in terms of your very excellent statement of the way the President and Congress are supposed to work together with the responsible administrators in carrying out a program.

Chairman **Perkins**. Do you want to comment immediately before I call on Mr. Kramer?

Mr. **Ford**. Only to this extent: I still don't get the nature of your "good government" argument when I recall that the President in June of 1978 was still worrying about who was using the tennis courts over there.

I think since then he has found out there is a limit on the number of things a President can permit to distract him from world-shaping issues. The scenario you present here of a flow of regulations from all of the Federal agencies coming through the Congress and being submitted to the President, would require us to get two more signing machines just for the purpose of signing the ones with which he agreed.

That is not the way it really works. What has happened here, until your most recent opinion, was that HEW and now the Department of Education, came up here and discussed what the regulation was going to be and presented to the committee what it was going to do. If, at our staff level, it produced a reaction saying, wait a minute, that is not what the committee intended, it got changed.

So what you do is learn how to count so that in effect you never actually have to count.

Again, let us use the analogy of atomic weapons being a deterrent. They are a deterrent because everybody is a little afraid to test them and fire one off to see what happens.

As a practical matter, that is how you protect the status between the three branches of Government. There is a kind of understanding that we will, in the Oriental way of putting it, have a see-no see policy that we aren't going to come face-to-face to a situation where somebody has to back down and permanently damage the relationship.

That is what the Congress has managed to do with the agencies affected by the legislation in this committee, and that is how it was intended to work. It wasn't intended to be a way in which we would have conflict. It was a way in which we avoid conflict, because if we logically follow the scenario that your Department's interpretation would place on respective powers, we would have to exercise the power that we have, and that very simply would be to change the law.

To give you an example: my subcommittee negotiated with the Department of HEW on the title IX regulations for women in collegiate athletics at a period of time when, if the regulations as they had been promulgated, were to be voted up or down by the Congress, you know what would have happened? Congress would have repealed all of title IX and set this country back a decade or maybe a generation on the rights of women at all levels in education.

Rather than taking a chance on creating that kind of reaction in Congress, we worked months and months trying to find a way to effectuate what they wanted to do with their regulations without precipitating a negative reaction. I don't think there is anybody who doubts if those regulations had come up a year ago in the form they were in at that time, that there would have been some vehicle in the House or the Senate that would have repealed title IX just like that.

That is the kind of confrontation we try to avoid—destroying a good law because an administrator gets out of sync with the people who wrote the law or, if you will, in the case of title IX, the popular prejudices of the moment.

The same Congress that passed ERA would have voted by an overwhelming majority to kill all of title IX, if it continued to look as if it was going to threaten Big Ten football. We found ourselves in the crazy position of jeopardizing all the social benefit of years of title IX over a question like women playing football, which actually wasn't a valid question, but was the perception everybody in this body had of those regulations.

Ultimately that problem was resolved by not having a confrontation. As far as I know, the Secretary has now promulgated regulations that are working well and the natives are restive out there, but, nevertheless, we do not have a revolution.

Mr. Goodling. It was that kind of confrontation the chairman was trying to avoid when he sent his letter to the Secretary of Education. That was the purpose of that whole letter so we would not have this kind of confrontation.

Mr. Harmon. If I might respond, that is exactly the way the system is supposed to work. That is the way the President contemplates it will work. That is the give-and-take. Again, going back to your analogy of the square off between two nuclear powers, the reason that two branches are able to negotiate is because both are negotiating from a position of strength. You have the ability to pass the law and the President has the ability to veto. You are asking that he accept this device which changes that balance and throws him into a position where he cannot negotiate from a position of strength.

Chairman Perkins. Mr. Kramer.

Mr. Kramer. Mr. Chairman, I think a member of your subcommittee, Mr. Petri, wanted to ask another question.

Mr. Petri. Just one more question.

Does your line of reasoning so far as congressional veto of rules issued by the executive department apply also to congressional veto of reorganizations promulgated by the executive department?

Mr. Harmon. No; and again the President explains in his letter and Attorney General Bell explained in his opinion that the power, the prerogative of the President is preserved. He presents a plan that cannot be changed by Congress. He must have approved it in advance. He has the prerogative of submitting no plan at all.

So his power, the check, is preserved in that case.

Mr. Petri. Wait a minute. Can't he supervise agencies so they don't originate rules that he doesn't want?

Mr. Harmon. This statute in fact requires regulations, the statute before the committee. Most of the statutes implementing substantive programs—that is the difference—require regulations in the statute itself. And in addition, even if there were no statutory requirement, the exigencies of the circumstance—the President must negotiate arms agreements, he must, by the force of events in the world, take action and, therefore, he does not have the prerogative again of taking no action at all—which again is the distinction.

Again, I will submit the opinion of Attorney General Bell that deals exacty with that point.

[The information referred to follows:]

ATTACHMENT 1

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

REORGANIZATION ACT—CONSTITUTIONALITY OF PROVISION PERMITTING DISAPPROVAL OF REORGANIZATION PLAN BY RESOLUTION OF A SINGLE HOUSE OF CONGRESS

The procedures set forth in section 906(a) of the Reorganization Act (5 U.S.C. 906(a)) providing for disapproval of a Reorganization Plan by the resolution of a single House are constitutionally valid. This conclusiin is limited to the particular statute involved.

The procedural steps set forth in Article I, section 7, of the Constitution for the enactment of legislation do not exclude other forms of congressional action.

A statute providing for congressional action not subject to presidential veto is constitutionally suspect because it potentially shifts the constitutional balance of power to Congress. However, if a statute does not affect the constitutional distribution of power, *i.e.*, if it effectively preserves the presidential veto power and respects the principle of bicameralism, it is not unconstitutional merely because it establishes a procedure not explicitly authorized by the Constitution.

The Reorganization Act complies with this standard. It preserves the President's veto power because he will submit to the Congress only plans which he approves. It preserves the principle of bicameralism because the plan will become not effective if it is opposed by either House. Finally, the provision does not violate the principle of the separation of power because it does not confer on Congress the power to interfere with the administration of an ongoing statutory program, a power reserved to the Executive branch. These considerations do not apply to the usual situation where a legislative veto is attached to legislation providing for the administration of continuing programs.

The conclusion that the legislative veto device is constitutional is limited to the narrow context of the reorganization statute because that statute does not affect the rights of citizens and deals exclusively with the internal organization of the Executive branch in which the President has peculiar interests and special responsibilities.

JANUARY 31, 1977.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor of responding to your request for my opinion on the constitutionality of Section 906(a) of the executive reorganization statute, 5 U.S.C. § 901, *et seq.*, which provides that an executive reorganization plan shall become effective 60 days after its transmittal to Congress by the President unless during that 60-day period either House passes a resolution disapproving the reorganization plan.

For the reasons set forth below, I am of the opinion that the procedures provided in Section 906(a) of the reorganization statute are constitutionally valid. I should emphasize at the outset that my opinion is limited to this particular statute, as explained below, and is to be taken in no manner as approving the constitutionality of the procedure of congressional disapproval of executive action by resolution in other statutes.

Article I, § 7, clause 3 of the Constitution provides that "every Order, Resolution, or Vote" to which concurrence of both Houses is necessary shall be presented to the President for his approval or veto. Section 906 of the reorganization statute authorizes Congress to take action by simple resolution of either House, a form of congressional action which is outside the legislative procedures set out in Article I. That statute authorizes Congress to exercise procedural power not explicitly granted to it by the Constitution. However, the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress.

The first Congress contemplated congressional action outside the normal Article I legislative process when it provided in the act creating the office of Secretary of the Treasury that either House could require the Secretary to make reports and furnish it certain information. Act of September 2, 1789, ch. XII, § 2, 1 Stat. 65–66 (1789). In 1789 the House of Representatives acting by simple resolution directed Secretary Alexander Hamilton to conduct certain studies and report the findings to the House. 2 Annals of Congress 904 (1789).

In 1897 the Senate Judiciary Committee specifically addressed the question whether Article I, § 7 required that congressional resolutions be submitted to the President for his approval or veto. Citing past practices of the Congress, the Committee took the position that the requirement of submission to the President of every vote for "which the concurrence of the Senate and the House of Representatives may be necessary" applied only where there was constitutional necessity. The Committee further determined that such constitutional necessity existed only in the case of the enactment of legislation S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897). The procedures prescribed in Article I, § 7, for congressional action are not exclusive. That has been the consistent interpretation of Article I by Congress since 1789.

The constitutional question, therefore, is not whether the congressional action contemplated by Section 906 of the reorganization statute literally conforms with the procedural steps specified in Article I, § 7, cl. 3. Rather, the question is whether the provision in the reorganization statute authorizing single House disapproval of an executive reorganization plan respects the constitutional checks on legislative power provided by the Framers of the Constitution in the presidential veto and the principle of bicameralism.

Congressional action outside the check of the presidential veto should be constitutionally suspect as it carries the potential for shifting the balance of power to Congress and thus permitting the legislative branch to dominate the executive. If a statute authorizing control by Congress over executive action by later resolution has the effect of evading the constitutional safeguards of concurrence of both Houses and the presidential veto, then it violates Article I, § 7 of the Constitution.

However, if the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive—that is, the power of presidential veto is effectively preserved and the principle of bicameralism is respected—the fact that the procedure is not explicitly authorized by the language of Article I is not enough to render the statute unconstitutional. I am of the opinion that the procedure provided in the reorganization statute for congressional disapproval of a reorganization plan submitted by the President satisfies this test and, therefore, is constitutional.

Under the reorganization statute procedure the two Houses of Congress and the President possess the same relative power as under the normal Article I legislative process. First, the President has ultimate veto power in his formulation of the reorganization plan. The President will submit to Congress only plans which he approves and rather than be forced to accommodate the demands of Congress as to the shape of the plan, he can decide to submit no plan at all.

This power to take no action with respect to reorganization plans should be carefully distinguished from the situation created by statutes which provide for subsequent resolutions disapproving presidential actions in the administration of continuing programs. The pressures of an ongoing program with prior commitments force the President to act. And he must take action acceptable to Congress if that action is to stand. This urgency for action which pervades the administration of continuing substantive programs subjects presidential decisions to increased congressional influence and effectively compromises the President's control over his actions. Such statutes frustrate the constitutional check of the presidential veto in violation of Article I and infringe on the doctrine of separation of powers.

Second, the principle of bicameralism, that each House of Congress has the right that there be no change in the law without its consent, is respected by the reorganization statute as no reorganization plan can take effect if opposed by either House. Both Houses have equal power with respect to the congressional decision to accept or reject the reorganization plan.

Third, in contrast to statutes which authorize subsequent congressional resolutions disapproving executive action in continuing programs, under the reorganization statute there is no assumption by Congress of discretionary control over administration of the law, and, consequently, no invasion of the traditional role of the executive branch. The reorganization statute does not involve creation of a new substantive program or congressional interference with authorized administrative discretion in an ongoing program. The doctrine of separation of powers is not violated.

In conclusion, I reiterate that my opinion as to the constitutionality of the legislative veto device is limited to the narrow context of the reorganization statute. This procedure is uniquely appropriate to executive reorganization. The reorganization statute does not affect the rights of citizens or subject them to any greater governmental authority than before. It deals only with the internal organization of the executive branch, a matter in which the President has a peculiar interest and special responsibility.

For the above reasons it is my conclusion that the procedure provided for in Section 906(a) of the reorganization statute does not violate the Constitution.

Respectfully,

GRIFFIN B. BELL.

ATTACHMENT 2

OFFICE OF EDUCATION—AUDIT HEARING PROCESS

AMENDMENT FOR TITLE I AUDIT HEARING—BOARD PROCEDURES

Pursuant to the authority contained in sections 201 and 204 of Reorganization Plan No. 1 of 1939 (4 FR 2728, 53 Stat. 1424) as amended by section 5 of REGISTER on October 27, 1972 in 37 FR 2053, 67 Stat. 631) 20 U.S.C. 2; Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a; and sections 434 and 435 of the General Education Provisions Act, 20 U.S.C. 1232c and 1232d, there is established within the Office of Education a Title I Audit Hearing Board.

The purpose of this notice is to amend the notice published in the FEDERAL REGISTER on October 27, 1972, in 37 FR 23002, which established the Title I Audit Hearing Board to review and provide hearings if necessary, upon final audit determinations made in the administration of the Title I of the Elementary and Secondary Education Act programs by the Office of Education. The change made in this notice will conform the scope of the notice to modifications which are being made by the Office of Education to speed up the audit resolution and settlement process.

OFFICE OF EDUCATION TITLE I AUDIT HEARING BOARD

Sec.
1. Scope.
2. Definitions.
3. Audit Hearing Board; Audit Hearing Panel.
4. Determinations subject to the jurisdiction of the Board.
5. Submission.
6. Effect on submission.
7. Substantive and procedural rules.
8. Hearing before Panel or a hearing officer.
9. Initial decision; final decision.
10. Separation of functions.

§ 1. *Scope.* This notice applies to final audit determinations made by the Office of Education after June 30, 1971, with respect to programs funded under Title I of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 241a et seq.). For the purpose of the notice, as amended, an audit determination by the Office of Education shall be considered final only after the grantee has been provided the opportunity to furnish documentation of otherwise comment on a Department of Health, Education, and Welfare Audit Agency audit report, or preliminary audit determination, and has been notified in writing that a final audit determination has been made with respect to the matters included in a final audit report and regarding implementation of the items contained therein.

§ 2 *Definitions.* For purposes of this notice:

(a) "Board" means the Office of Education Title I Audit Hearing Board, as described in paragraph (a) of section 3.

(b) "Board Chairperson" means the Board member designated by the Commissioner to serve as Chairperson of the Board.

(c) "Panel" means an Audit Hearing Panel, as described in Paragraph (b) of section 3.

(d) "Panel Chairperson" means a member of an Audit Hearing Panel who has been designated as Chairperson of such Panel by the Board Chairperson.

(e) The terms "Department" and "Departmental" refer to the Department of Health, Education, and Welfare.

(f) "Commissioner" means the U.S. Commissioner of Education.

(g) "Grantee" means a State educational agency to which payments have been made under section 143 of the Elementary and Secondary Education Act.

(h) "Title I" means Title I of the Elementary and Secondary Education Act (20 U.S.C. 241a et seq.).

(i) "Final audit determination" means a finding or findings based on an audit report of the DHEW Audit Agency, the General Accounting Office, or other Federal Auditing Agency, and the documentation or comments of the grantee and sustained by the Deputy Commissioner for School Systems of the Office of Education, in writing to the State educational agency.

§ 3 *Audit Hearing Board; Audit Hearing Panel.* (a) There is established, within the Office of the Commissioner, an Office of Education Title I Audit Hearing Board, whose members shall be designated by the Commissioner to perform the functions described in this notice. Subject to limitations set forth in section 10 of this notice, persons who are officers or employees of the Department or its constituent agencies as well as other Federal officers or employees may serve on the Board. Persons who are not otherwise full-time employees of the Federal Government may, in accordance with appropriate arrangements, also be asked to serve on the Board. Service on the Board may be on a regular or an intermittent basis.

(b) The Commissioner shall designate one of the members of the Board to be Chairperson. The Board Chairperson shall designate Audit Hearing Panels for the consideration of one or more cases submitted to the Board. Each Panel shall consist of not less than three members of the Board. The Board Chairperson may, at his or her discretion, constitute the entire Board to sit as a Panel for any case or class of cases or may be a member of a Panel. The Board Chairperson shall designate himself or herself or any other member of the Panel to serve as Chairperson.
(20 U.S.C. 241a 1232c)

§ 4 *Determinations subject to the jurisdiction of the Board.* (a) Subject to section 5 and paragraph (b) of this section, the Board shall have jurisdiction in those cases in which a grantee under Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a et seq.) has been notified in writing that a final audit determination has been made that an expenditure not allowable under the grant has been made by the grantee (or by a subgrantee to which it has made payment under Title D, or that the grantee (or the subgrantee) has otherwise failed to discharge its obligations to account for grant funds.

(b) A notification described in the preceding sentence shall set forth the reasons for the determination in sufficient detail to enable the grantee to provide a statement of position required by section 5(a)(2) of this notice, and shall inform the grantee of his or her opportunity for review under this notice. In the case of final audit determinations made prior to the effective date of the notice published in 37 FR 23002, the Deputy Commissioner for School Systems may designate those notifications which have previously been made to grantees as final audit determinations and which he deems to comply with this paragraph. Upon receiving notice of this designation, the grantee shall be deemed to have received a notification for purposes of the paragraph.
(20 U.S.C. 241a, 1232c)

§ 5 *Submission*—(a) *Application for review.* (1) A grantee for whom a determination described in section 4 has been made, and who desires review, may file with the Board an application for review of this determination. The grantee's application for review must be postmarked no later than 30 days after the postmark date of notification provided pursuant to section 4(b), except when the Board Chairperson grants an extension of time for good cause shown.

(2) Although the application for review need not follow any perscribed form, it shall clearly identify the question or questions in dispute and contain a full statement of the grantee's position with respect to the question or questions, and the pertinent facts and reasons in support of this position. The grantees shall attach to his submission a copy of the agency notification described in section 4(b).

(b) *Action By Board on an application for review.* (1) The Board Chairperson shall promptly send a copy of the grantee's application to the Deputy Commissioner for School Systems.

(2) If the Board Chairperson determines, after receipt of an application for review, that the requirements of section 4 have been satisfied, he shall promptly notify the applicant and the Deputy Commissioner for School Systems and refer the application to an Audit Hearing Panel designated pursuant to section 3(b) for further proceedings under this part. If he determines that these requirements have not been met, the Board Chairperson shall return the application to the grantee with reasons for its rejection.
(20 U.S.C. 241a, 1232c)

§ 6 *Effect of submission.* When an application has been filed with the Board with respect to a determination, no action will be taken by the Office of Education to collect the amount determined to be owing pursuant to this determination until the application has been rejected or until the Commissioner has signified his final decision. The filing of the application shall not affect the authority which the Office of Education may have to initiate proceedings under section 146 of Title I.
(20 U.S.C. 241a, 1232c)

§ 7 *Substantive and procedural rules.*—(a) *Substantive rules.* The Panel shall be bound by all applicable laws and regulations.

(b) *Procedural rules.* (1) With respect to cases involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford each party to the proceeding an opportunity for presenting his or her case at the option of the Panel:

(i) Wholly or partially in writing; or

(ii) In an informal conference before the Panel which shall include provisions designed to assure to each party.

(A) Sufficient notice of the issues to be considered (where such a notice has not previously been afforded); and

(B) An opportunity to be represented by counsel.

(2) With respect to cases involving a dispute of a material fact in which the resolution of the dispute would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford each party an opportunity for a hearing, which shall include, in addition to provisions set forth in paragraph (b)(1)(ii) of this section, provisions designed to assure each party the following:

(i) A transcript of the proceedings;

(ii) An opportunity to present witnesses on his or her behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(c) Intervention of third parties.

(1) Interested third parties may, upon application to the Board Chairperson, intervene in proceedings conducted under this notice. This application must indicate to the satisfaction of the Board Chairperson that the intervenor has information relative to the specific issues raised by the final audit determinations, and that this information will be useful to the Hearing Panel in resolving those issues.

(2) When third parties are given leave to intervene in accordance with subparagraph (1) above, these parties shall be afforded the same opportunities as other parties to present written materials, to participate in informal conferences, to call witnesses, to cross-examine other witnesses and to be represented by counsel.
(20 U.S.C. 241a, 1232c)

§ 8 *Hearing before Panel or a hearing officer.* A hearing pursuant to section 7(b)(2) shall be conducted, as determined by the Panel Chairperson, either before the Panel or a hearing officer. The hearing officer may be:

(a) One of the members of the Panel; or

(b) A non-member who is appointed as a hearing examiner under 5 U.S.C. 3105.
(20 U.S.C. 241a, 1232c)

§ 9 *Initial decision; final decision.* (a) The Panel shall prepare an initial written decision, which shall include findings of facts and conclusions based thereon, for submission to the Commissioner. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions upon which these decisions are based, and these findings and conclusions shall be incorporated in the initial decision.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party and intervenor, or his or her counsel, with a notice affording each party an opportunity to submit written comments thereon to the Commissioner within a specified reasonable time.

(c) The initial decision of the Panel shall be transmitted to the Commissioner and shall become the final decision of the Commissioner unless, within 25 days after the expiration of the time for receipt of written comments, the Commissioner signifies his determination to review the decision.

(d) In any case in which the Commissioner modifies or reverses the initial decision of the Panel, he shall accompany this action by a written statement of the grounds for modification or reversal, which shall promptly be filed with the Board. This decision shall not become final until it is served upon the grantee involved or his or her counsel.

(e) The authority to review initial decisions shall not be delegated. Review of any initial decision by the Commissioner shall be at his discretion and shall be based upon the decision, with written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties to the proceeding, or by their counsel.
(20 U.S.C. 241a, 1232c)

§ 10 *Separation of functions.* No person who participates in prior administrative consideration, or in the preparation or presentation of a case submitted to the Board shall advise or consult with, and no person having an interest in the case shall make or cause to be made a communication to, the Panel, Board, or the Commissioner with respect to the case, unless:

(1) All parties to the case are given timely and adequate notice of this advice, consultation, or communication; and

(2) Reasonable opportunity to respond is given all parties.
(20 U.S.C. 241a, 1232c)

Effective date: This notice shall become effective August 11, 1976.

(Catalog of Federal Domestic Assistance Numbers 13.427, Educationally Deprived Children—Handicapped (P.L. 89-313); 13.428, Educationally Deprived Children—

Local Educational Agencies; 13.429, Educationally Deprived Children—Migrants; 13.430, Educationally Deprived Children—State Administration; 13.431, Educationally Deprived Children in State Administered Institutions serving neglected or Delinquent Children.)

Dated: July 2, 1976.

T. H. BELL,
U.S. Commissioner of Education.

[FR Doc. 76-10032 Filed 7-9-76; 8:45 am]

Chairman PERKINS. Go ahead, Mr. Kramer.

Mr. KRAMER. Thank you, Mr. Chairman.

I would like to compliment you and Mr. Ford and Mr. Levitas on all of your remarks. I think that they are certainly well taken and right on the mark.

It seems to me there isn't a more important issue facing this country in terms of its productivity than the never ending series of regulations people in this country are constantly confronted with.

In this particular case we are involved in a situation that is clearly in violation of the statutory intent of this body. Our statute in one example says that the Education Appeals Board will operate so that appeals are submitted within 30 days. Then the regulatory authorities turn around and say, no, that isn't sufficient time. We shall put a variance on that to allow appeals to linger well beyond 30 days at the discretion of the executive department even though the Congress intended those to be done expeditiously.

What you are suggesting is that we have no remedy in a situation like that, where there could be no clearer case of violation of the intent of this body which is to suggest that we have to pass another law to undo that where you are apparently unwilling to obey the first law we passed.

That process obviously can go on ad infinitum. If you choose to ignore those things that you want to ignore, it doesn't matter how many laws we pass.

What I find particularly arrogant, not in your remarks personally, but in the position you are advocating, is you are in effect saying a regulation has the force of statute and they are equal. They are not.

I might not have learned much in school, but it was my understanding that regulations were, in fact, creatures of statutes and, in effect, are promulgated pursuant to legislative delegation that we have the ability to do ourselves but have decided, perhaps because of the details involved, we ought to give some discretion to the administrative agencies.

But those delegations are legislative delegations in nature. Your position is one that says, simply put, a regulation that you promulgate has the same value as one of our statutes.

You are suggesting to us that where you, in fact, want to rewrite our statutory intent—in other words, the example in front of us saying that you disagree with the 30 days and that a longer period of time is necessary and rather than asking us to come back and rewrite the statute because of some particular problem you might have with it—you simply pass a regulation that violates that statute.

You suggest that our remedy is then to resubmit under the presumptive laws of the Constitution to the President new corrective legislation which the President than has an opportunity to, in effect, turn down. By doing that you suggest that the President not only has the executive power to implement the laws of this country and that particular regulation, the executive power to promulgate that regulation which is a violation of the statute, and, the judicial power to, in effect, make the final decision as to whether or not he is going to accept our judgment on your violation of our statutory intent.

In other words, you have, by your argument, I think, made your executive agency not only into one that has legislative ability independently of that which we, Congress, have given you, but also judicial powers as well. If you make us present to the President our disapproval in this particular instance, what you are doing is rendering this body powerless to act in any way without the approval of the President.

I suggest to you that is a power that goes far beyond separation of powers. In effect it allows the President to be the arbiter of any statute that we promulgate and does not go only to any attempt that we make to correct any deficiencies stemming from his own branch of government.

Mr. HARMON. If I may respond, the point is that Congress does have the power, clear authority, to delegate as it did in this case, and in fact mandate the regulations to establish these programs. It could have taken care of the details but chose, I think wisely, as Mr. Ford pointed out, not to. There are many details and many practical applications in 50 States rather than in any one particular State or district that must be taken into account. The Congress relied upon the Secretary when it delegated and wrote a statute.

You say that the Secretary violated that statute. The Secretary interpreted that law. She does not believe she has violated the statute. That is her interpretation of the law.

But, again, you have the authority exactly in the same manner that you acted in this case, that is, to vote, a vote by both Houses and then take the next step of presentation to the President.

Congressman Ford pointed to vote counting—that is exactly right.

Mr. KRAMER. In effect you are saying if we have to have the Executive's approval when you choose to violate a law that we have passed, that we have to have your approval to undo that violation. I have never heard of anything so ludicrous.

Let me ask you one or two other questions, if I might. Would you agree that our statute saying the Education Appeals Board clearly states 30 days? Is there any doubt about that? Is there any ambiguity about that in the statute, in your judgment?

Mr. HARMON. I have read the prepared statement of the Secretary of Education here and her interpretation of that statute.

Mr. KRAMER. I am not asking about her interpretation.

Mr. HARMON. I accept that interpretation.

Mr. KRAMER. Are you saying that the statute has any ambiguity in it in terms of the appeals period specified by the statute?

Mr. HARMON. The appeal period is 30 days.

Mr. KRAMER. Are you saying you disagree with the position that your regulation extends that 30-day appeal period?

Mr. HARMON. The regulation, as I understand it, provides for exceptions to the 30 days.

Mr. **Kramer**. And those exceptions are provided in the statute?

Mr. **Harmon**. The statute was passed, as I understand it, with the history of the Department making exactly these exceptions when the statute passed. The argument which I find persuasive is that in fact that practice was adopted in passing the statute—the power to extend.

Mr. **Kramer**. You are basing it then on an interpretation rather than what the statute specifies?

Mr. **Harmon**. On the legislative history like that we are making here today on something else, yes, the legislative history——

Mr. **Kramer**. But you agree that the literal terms of the statute are not consistent with the regulation?

Mr. **Harmon**. No.

Mr. **Kramer**. Let me put it simply. Something says 30 days and something else says 30 days plus. Would you not agree those are not compatible?

Chairman **Perkins**. Let me interrupt the gentleman to say that we sent a letter down more than 1 year ago saying it had to be 30 days.

Mr. **Harmon**. Again, this is a question that has been treated in the Department of Education and it is not a question upon which we have opined or been in fact consulted—and on which I am not prepared to respond.

Mr. **Ford**. Will the gentleman please yield?

Mr. **Kramer**. Yes.

Mr. **Ford**. It occurs to me that there is another example of what happens when administrators stir up the right kind of reaction in Congress. When we passed the emergency public works legislation, we did something rather unusual. We said that the Department of Commerce should act within 60 days on an application for funds, and failure to act within 60 days amounted to an approval of the application.

That caused all kinds of anguish among bureaucrats. At the time, there seemed to be no possible way we could deal with anything this big. Lo and behold, we did, because an intransigent department was saying our customary way to do this is as follows. This led the Congress to do a rather extraordinary thing.

I don't know of any statute which said that anybody with discretion to approve or disapprove an application had to act that quickly or face the consequence of having it approved by failure to act.

It worked. Because it worked, it is very likely that Congress might do the same sort of thing in the future if it feels frustrated enough to do it.

The gentleman from Colorado has a perfect case in point. I really can't undestand why you would subject a new department like the Department of Education to being the one to decide how many angels can dance on the head of the pin, because in my mind that is all you are going to find out when you get through with this thing.

There really is no permanent solution involved here to any pressing problem for this country. The Justice Department is putting the Department of Education—a new department with tremendous problems to overcome just in getting established—in a terrible position.

If you want to test this, get Labor or somebody else and play with them.

Chairman **Perkins**. Go ahead, Mr. Kramer.

Mr. **Kramer**. Thank you, Mr. Chairman.

I find it incredible you are sitting here as a representative of the Attorney General and advising that you are not even versed, if I understand what you are telling me, in having examined the statute and the regulation in question.

I would hope you would take the time while we sit here during this hearing to explain to me how the position of the Department of Education is not inconsistent with that of this body. Usually we have a complicated series of things that obviously no one understands, which is a problem separate and apart from the one we are dealing with here. Here you have a classic case where the chairman has stated over 1 year go it was made clear there was no exception intended by implication. The statute is clear on the face. It says 30 days. The Department then comes forward and says they don't like that, that is not an appropriate appeal period, so they will change it and provide for waivers and exceptions.

Then for you to come here and lodge all these constitutional arguments which I admit are obviously concise in every issue—that alleges that, in certain circumstances maybe the Congress hasn't exercised its legislative veto authority appropriately, even in this case, where it seems to be so clear that the regulation exceeds the scope of the statute without any justification, and you thereby are creating in your capacity as repreeentive of the Attorney General here today, a constitutional confrontation, of immense constitutional importance, it seems to me incredible, in my judgment, that you could have done so without ever having examined the statute and the regulations in question.

I would like to know whether or not you have read this.

Mr. **Harmon**. Yes; I have read the statute and the regulation in question. My position to you again is that this statute places the responsibility for interpretation and implementation of the regulations in the Secretary.

Mr. **Kramer**. Where does it say that you can pass regulations that are inconsistent with the statute?

Mr. **Harmon**. It does not say that you can pass regulations inconsistent with the statute but it gives to the Secretary the authority to implement.

Mr. **Kramer**. Implement a 30-day appeal period?

Mr. **Harmon**. Promulgate and implement regulations giving effect to the statute enacted. Again, the Secretary has determined that within that statute, considering its legislative history as part of the statute as well, there is the authority to grant the exception and the exemptions. That is her authority I am here to opine for you.

Mr. **Kramer**. Can you show me a document anywhere that indicates or implies in any way that the legislative history was such that it gave the Secretary the discretion to extend or change the appeal period specified in the statute?

The chairman has said there is no such legislative history.

Can you show me something in writing? Obviously, I think, we are at the point where you are acknowledging it is not in the statute. I think, if I hear what you are saying the statute might seem to be inconsistent with the legislation but the legislative history clearly indicates the Secretary ought to have that capability.

Mr. **Harmon**. I would be happy to produce for you the document that indicates the regulations in force and effect at the time the Congress considered this new legislation including the regulation providing for exceptions and tolling of the running of the time to file. Those regulations were before this body and in fact those regulations were not challenged.

That is the basis, as I understand it, of the Secretary's interpretation. Again, it is the Secretary who has the authority to interpret that statute as the basis for the interpretation. I believe that interpretation is explained in the prepared statement that the Secretary has submitted to the committee for presentation today.

Mr. **Kramer**. I yield, if I have any time left.

Mr. **Miller**. This was not the best set of regulations to bring the constitutional issue to a head. I dare say that if that 30 days had been strictly adhered to, there is probably not a member on this committee who would not be running and trying to make a case that there were unforeseen circumstances, that there was good cause that the appeal should not be lost by within our district, that the deadline was arbitrary and this was not what the Congress meant because we obviously wanted to follow the rule of the reasonable man. All of those cases would have been brought because our district would have lost some funding if they had not complied after the audit.

So I think we ought to understand that perhaps while we have a numerical basis on which to say the regulation was in compliance or not in compliance with the law. Each of us would have found the rationale to suggest that an absolute enforcement of those 30 days would have worked grave hardship and would have made the Federal Government look very bad.

So I think at best we have a very bad set of regulations on which to make this fight, Mr. Harmon. I appreciate what Mr. Ford and others have said. This is not a regulation of great substance on which this argument should have been made. I can understand in the purity of the constitutional argument any time the veto is imposed, but the underlying regulations are less than constitutional in scope as far as I am concerned.

Chairman **Perkins**. Mr. Biaggi.

Mr. **Biaggi**. Before the recess, Mr. Harmon spoke about self-survival. That seems almost like a philosophical question. I won't elaborate on that. Given the situation in the confrontation that is I think where we are would you concede?

Mr. **Harmon**. I think the nature of the proceeding this morning confirms that.

Mr. **Biaggi**. Then why didn't we take this question 431(d) to the courts? In the end that is the arena of resolving it.

Mr. **Harmon**. In order to take this to the court we have to have a case or controversy—clearly we have a controversy between this committee and the Department of Justice and maybe even the Department of Education—there may in fact be a party who will proceed and will be able to say that he was in fact harmed by the committee's exercise of the veto in this case and the changed regulation and may be able to bring that case. That person will have to establish he has suffered a harm because of this action or a harm more particularly because the Secretary has ignored the veto passed by this Congress.

If that person can show that their appeal would have been decided differently——

Mr. **Biaggi**. If that is the case, what would be the consequence? Do we continue to ignore the veto and wait for another case to come by?

Mr. **Harmon**. My point is there would not be a case—the President has certain constitutional powers.

Mr. **Biaggi**. So has the legislative body.

Mr. **Harmon**. Excuse me. If Congress could eliminate that power and it were in limbo up until there was a court challenge, the President would be blocked in his constitutional obligation to uphold both that statute and this Constitution, but the Constitution is supreme.

That is the impossible situation that it would put him in. When I use the word "self-survival," self-defense contemplated within the Constitution, the tug of war that both the chairman and Congressman Ford have pointed to is a tug of war between positions of strength.

In any negotiation, when you negotiate from a position of strength you are going to reach compromise. The Government will run and run very well. But, again, it is preservation of that position of strength that is at stake here for the President.

Mr. **Biaggi**. That question has come up many, many times, the position of strength, and with respect to the relative positions of all the parties of the tripartite system.

In the end the issue has never been fully resolved in the only arena that can really resolve it. We are going to be pulling and tugging ad infinitum.

Mr. Ford testified early on the Congress just about hamstrung a predecessor administrator President. That is not the way we should be functioning and no one wants to do it.

Mr. **Harmon**. Certainly not.

Chairman **Perkins**. Mr. Weiss.

Mr. **Weiss**. No questions.

Chairman **Perkins**. Mr. Kildee.

Mr. **Kildee**. Thank you, Mr. Chairman.

Mr. Harmon, Congress could refuse to delegate rulemaking power to a department or agency, could it not?

Mr. **Harmon**. Clearly.

Mr. **Kildee**. If it can refuse to delegate that rulemaking power, a forliori, could it not then put limitations on that rulemaking power?

Mr. **Harmon**. Clearly as Congressman Ford referred to a strict limitation that was imposed on the Department of Commerce and correctly in the sense that the limitations could be imposed.

Mr. **Kildee**. The limitations could be imposed. Could not one of those limitations be a congressional veto or rejection?

Mr. **Harmon**. Constitutional limitation. The limitation could not be: No grant would be made to any person who sends a black child and white child to school together or to any person who advocates election of Ronald Reagan or someone else. No. There are limitations on the conditions.

Mr. **Kildee**. I don't see what legerdemain you are using here. If Congress can refuse to give rulemaking or regulating power, why can we not give rulemaking or regulating power with a limitation such as a check on those powers?

Mr. **Harmon**. Because, again, I repeat that you can impose limitations that do not violate the Constitution.

Mr. **Kildee**. Give me the genesis of that.

Mr. **Harmon**. Every vote to which concurrence of the Senate and House of Representatives may be necessary shall be presented to the President of the United States.

This condition—it is the position of the Attorney General, that the condition is unconstitutional.

Mr. **Levitas**. Will the gentleman permit me to respond?

Mr. **Kildee**. Yes.

Mr. **Levitas**. I don't want to belabor these constitutional points because you have experts who will be speaking to this later but I have opinions from the Justice Department in which they have acknowledged that concurrent resolutions having the effect of vetoes are not required to be presented under certain circumstances.

I think almost every legal scholar has agreed there are certain concurrent resolutions which have the effect of a veto that do not have to be submitted and I will be glad to present this and present the Attorney General's own opinions on that point.

Mr. **Kildee**. I grant that in the amendment provisions of the Constitution there is no reference to a signature by the President. We don't send amendments to the President. Those go out immediately to the States.

It would seem that though it is not specified in the Constitution, logic would lead us to believe that if Congress can withhold rulemaking or regulating power it could put limitations on that power.

Mr. **Harmon**. Again, I repeat——

Mr. **Kildee**. I appreciate the language in the Constitution that you have cited, but I still would not quite agree with your conclusion.

Mr. **Weiss**. Are you saying where one House vetoed that would meet the constitutional challenge?

Mr. **Harmon**. No, I am not.

Mr. **Weiss**. Read again the section you just read.

Mr. **Harmon**. Every resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary——

Mr. **Weiss**. Concurrent to the Senate and House; so you have a one House veto according to that argument, only the House, then it is constitutional?

Mr. **Harmon**. No.

Mr. **Weiss**. Explain why not.

Mr. **Harmon**. Because one House would be purporting—this is a prerogative that would involve a dispute between this House and the other House. In fact, that is the reason it is not an issue here——

Mr. WEISS. Supposing both Houses agree that one House veto by either House would be satisfactory?

Mr. HARMON. In the particular case with the exercise of a veto by one House it would violate the principle of bicameralism. The action by the Congress——

Mr. WEISS. You have never heard of a one House provision in legislation that has been passed by the Congress?

Mr. HARMON. Oh, yes, and we have debated that and would address that if that were the provision here.

Mr. FORD. Will the gentleman please yield?

Mr. KILDEE. Yes.

Mr. FORD. Are you now saying that is on its face unconstitutional?

Mr. HARMON. I am saying that violates the principle of bicameralism embodied in article I of the Constitution.

Mr. FORD. What about the President's pay recommendations for the executive branch, judiciary, and Congress that will come up in January? That law says if either House rejects his recommendation, it can't go into effect.

Are you now telling us that he is going to send up here an unconstitutional recommendation under an unconstitutional act?

Mr. HARMON. That is the issue that was litigated before the Court of Claims in the *Atkins* case Mr. Levitas referred to and was in fact decided on a narrow point there and was upheld. I would be pleased to provide the Congressman with a copy of that opinion.

Mr. FORD. That is just one example of what the gentleman has been talking about. They found nothing offensive about that idea of one House veto.

Mr. HARMON. The Court of Claims. You are correct.

Mr. KILDEE. Since you cite that language in the Constitution referring to any vote in the House and Senate, let me ask you this just for a theoretical pursuit. Suppose Congress were to draft language to the effect that the chairmen of the two authorizing committees in the House and Senate could veto rules or regulations which they judged to be beyond the intent of Congress. A vote by the House or Senate would then not be necessary, would it?

Mr. HARMON. No.

Mr. KILDEE. Is there any constitutional limitation on letting the two chairmen have such authority?

Mr. HARMON. The constitutional limitation is before that which determines how a law becomes a law. It is passed by both Houses.

Mr. KILDEE. You say any vote taken in the House. Suppose the two authorizing chairmen have that veto authority?

Mr. HARMON. That would violate, in my opinion, article I, section 1, clause 1, of the Constitution.

Mr. KILDEE. Congress would have already legislated when it passed the original bill. Now it would be putting a limitation upon the rules and regulations implementing that bill.

Mr. HARMON. The point that I made earlier is that by legislation you cannot change the Constitution. You cannot pass a bill of attainder, for example.

Mr. KILDEE. We know that.

Mr. HARMON. You could not provide a different provision for passing law or changing substantive law.

Mr. **Kildee.** I think the committee has a logical argument about a constitutional question that should probably be fought in a better forum with a better department that dates back to 1789 rather than a fledgling department.

Chairman **Perkins.** Will the gentleman please yield?

Mr. **Kildee.** Yes.

Chairman **Perkins.** A concurrent resolution does have the force and effect of law where in the original act we have granted that power to the Congress to come back and veto. That is what we are talking about here.

Mr. **Kildee.** That is the issue, Mr. Chairman.

Mr. **Goodling.** I understand, Mr. Harmon, you would like a court case. I would like to ask the secretary of education from Pennsylvania, Dr. Scanlon, whether we may not have already obliged you.

Dr. Scanlon.

Mr. **Scanlon.** We filed an appeal Tuesday in the third circuit court and you have your case.

Mr. **Kildee.** I yield back the balance of my time.

Chairman **Perkins.** Mr. Simon.

Mr. **Simon.** Let me just reflect on a few things here. It seems maybe we can all learn some lessons in this process. One is it seems to me whenever we can achieve a goal without confrontation, that is desirable. It seems to me the Department of Justice and perhaps the Department of Education made a mistake here.

Second, when you pick a fight on a constitutional issue, get on good solid ground. Here it seems to me apparently that has not been done.

Third, we all, on the legislative side and the executive side, have to exercise some commonsense. Bill Ford is absolutely right. If we take this to the extreme—there is a tendency in this direction already—we are going to be passing statutes of unbelievable length and detail that really do not serve the pubic well and; second, we are not going to do precisely what we ought to be doing, sitting down on title IX as was done there.

We face a situation in the Department of Transportation where because of rigidity and inflexibility on another matter we may lose some ground we gained in help for the handicapped by people who simply are not willing to sit down and exercise some commonsense. That has to be done.

I hope all of us can learn from this lesson. I hope we don't have to repeat going through this a year from now or 5 years from now.

I yield to my colleague from California.

Mr. **Miller.** I would hope this matter is decided in the court and the Supreme Court.

Under your interpretation, if you were to win, in fact what would be required of us, if we wanted to reserve our ability to have the say over these regulations without going back, as Mr. Kramer pointed out, and passing new laws to take care of one point of the general law, would be to write our own regulations?

Mr. **Harmon.** I think not, because if you would win on this case, what would be left intact would be what I will refer to as a report-and-wait provision. That is, only one part of this law would be stricken if we prevail and that would be the legislative veto provision.

The report-and-wait provision would remain intact, that is, the regulations would be given to this committee and the regulations would not take effect for 45 days. This committee could recommend, as it did in this case, rather than a concurrent resolution, a joint resolution.

Mr. **Miller**. I understand that, but the point is to affect what we don't like in those regulations. In effect, you can report and wait and at the end of 45 days you can still thumb your nose at us.

It seems to me what has happened in the sense of your argument—and I think I tend to agree with the argument—it denies what has taken place within the Federal Government of this evolutionary process of greater and greater regulation writing.

The question is in a sense we pass the law and pass on the authority to write the regulations. In fact, is that still the process of writing the law? Or is that a pure executive branch operation? It is not really because the law is not yet final.

I think the question is if the court decides that we don't have the right to veto, do we strip the agencies of their regulation writers and bring them into the legislative branch of government and put them on the staff of the Education Committee or Joint Legislative Counsel or however you do it. Saying we have no other avenue other than to make the law final with the final set of regulations—otherwise, we just keep going back and reviewing in an endless process all the controversial law.

If we pass the Superfund and it is signed by the President, our opportunity is to go back and reopen the entire Superfund discussion a year from now to get at one portion of the regulations.

So I wish the decision would come tomorrow from the Supreme Court because I think it will be a fascinating one because of the implications on whether it is in fact a delegation or not.

If you look at what you are saying and the brief of the gentleman from North Carolina Law School, I don't see that we can continue the so-called delegation of regulation writing. Either that or we can go ahead and the law is clear on its face and the Secretary of any agency can go ahead and administer the law and be sued upon the face of the law rather than the regulation.

Mr. **Harmon**. That is an alternative.

Mr. **Miller**. Then you get into what Mr. Ford described.

Mr. **Harmon**. The alternative that is available is exactly the process that we are going through now and would under this act, that is, that this committee, if you disagree with this regulation, it is not every regulation with which the committee disagrees—but when that occurs—and it is not every regulation—when that occurs, then the same process that you employed in this situation would be required. But again the counting—the executive is obligated to count votes, and that is exactly right, but the opponents of that position are also obligated to count votes as well.

That is the point. If the decision by the Congress must go back to the President, then there is some other counting to go on. That is the tug of war.

Mr. **Miller**. I would just hate, based upon certain rules and regulations, given the titanic struggles that we have on certain pieces of legislation around here, to go back and try to recreate the Department of Education today. I would hate to open up the Clean Air Act because of one part of the regulations.

Somehow the discretion within the agencies has to be maintained. The Congress, which is generally held accountable for those actions, has to maintain the process.

Mr. HARMON. In this case, the concurrent resolution passed by voice vote in the House and in the Senate. There was not reopening of the Department of Education Act. I am saying there is an alternative to reopening every issue and that I think that alternative works. It could work and will work.

Mr. KILDEE. One of the problems we have in the Congress is that to remedy legislation we must often attempt to override a Presidential veto, which takes a two-thirds vote. We could have written Polk's directory rather than a brief bill. That is the problem we have in trying to maintain our prerogatives.

Mr. HARMON. I understand and appreciate the point.

Mr. FORD. Mr. Miller came close to it. Obviously, you are here to testify, as I take it, in the role of a a legal technician and not as a policymaker in the Department of Justice. But you are a lawyer representing the executive branch, and a lawyer always has to examine his or her advice to the client on what course of conduct they ought to pursue in order to get their remedy in terms of what the ultimate effect on the client is going to be.

I am left with the genuine concern that you are about to put your clients in the history book and our President will go in there along with President Nixon as somebody who strained a little bit too far on Executive privilege until something snapped back and may have damaged the institution of the President because of his concern. I'm afraid the executive branch might, if it pursues this, win.

If you win, then how do you describe the process of the future? Ten years from now law students will be writing their doctoral theses on the decade of stalemate between the Congress and the executive branch when Congress set about to write complex, unworkable statutes in response to a Supreme Court decision which said they could not second guess the executive branch on regulation writing.

That may be good reading for law students a decade from now, but it makes our administration responsible for setting off a whole new direction in a relationship between the Congress and the executive branch, which I find difficult to justify in terms of how it will benefit the country.

While there may be lawyers at Justice who feel constrained to take the position that technically we are right, and, therefore, we should test this and prove we are right, I think lawyers also have a responsibility to decide whether or not just being right on the law is the best advice they can give to their clients, and the most responsible way to resolve the problems of their clients.

As one member of this committee who wants to see this administration succeed, I think you are predicting a bad 4 years for the President if he gets reelected. I don't think you should throw this at him. Maybe we should have Attorney General Civiletti up here. He is supposed to be making policy decisions. Perhaps we can find out on what basis he feels that it is for the good and welfare of America to pursue this technically correct course of action, which if supported by the courts, is going to bring about chaos.

If you win, we lose—not the Congress, everybody does.

Mr. **Harmon**. I think that the response to that is this Republic has survived pretty well. It made it through two World Wars without the legislative veto and we made it to this point. This proliferation began only recently—this is one of the earliest here. But if you say the Republic will crumble without it, I think that history does not prove that. There was this balance. We are in a new era with a new experience here with this legislative veto device that we are trying to resolve.

Mr. **Ford**. Let me give you an example. If the legislative veto had not been attached to the bill creating the Department of Education, you would be here with somebody from a different Cabinet position because it didn't exist.

That bill passed by about 14 votes in the House, and one of the reasons it passed by such a small margin was a very strong concern by a number of people that this Department could easily get off the track and write a lot of regulations, and do a lot of things that Congress would not be able to control.

That was a part of the quid pro quo for Congress agreeing to go along with elevating the power of the executive dealing with education in this Government.

If you win, what you are saying to those people who oppose this, is "we told you so." As soon as they got the Department, they started chipping away at the protections and safeguards we wanted as a condition to adopting it.

If one contemplates the horror of electing a President who is as a candidate advocating the abolition of the Department, we are giving him the ammunition to do it. The consequences that can flow from this are, in a practical sense, far more important to the country than the question of who is right or wrong on the constitutional niceties of the issue.

The issue is not worth being resolved in the court, because whether or not it is resolved in your favor, it is going to create as a consequence predictable political repercussions that won't work well for anything we want to do. Far be it for me to suggest that lawyers ever make the decision of what is politically expedient, but in this case I am talking about political expedience which furthers the spirit of the Constitution and avoids having a confrontation that permanently damages the relationship between two important branches of the tripartite government.

Maybe you are not the one to make the decision but I hope we can find somebody who makes the decision to say, hey, this is the time to back off and think it over.

Chairman **Perkins**. Mr. Kogovsek.

Mr. **Kogovsek**. Mr. Chairman, I would just like to associate myself wilth the remarks made by the gentleman from Michigan, Mr. Ford. I couldn't say it any better. I applaud him for his statement.

Chairman **Perkins**. Madam Secretary, we regret that we have held you here but you know you yielded to the Attorney General this morning, and we had certain questions to discuss with him. I think he pretty well discussed those questions. I don't recall of any Attorneys General coming before the committee in the past advocating a confrontation. Be that as it may, the Congress has to assume its responsibilities and carry on in the way we feel is in the best interests of the country.

I am delighted that you are here this morning and I welcome you. You may proceed at this time in any manner you prefer, Madam Secretary.

Thank you very much, Mr. Levitas.

Before you commence there may be a certain question regarding the cases Mr. Levitas discussed and I may want to address a letter to you, Mr. Levitas.

STATEMENT OF HON. SHIRLEY M. HUFSTEDLER, SECRETARY, U.S. DEPARTMENT OF EDUCATION

Secretary **HUFSTEDLER**. I welcome the opportunity to appear before you and the members of your committee to discuss with you the disapproval of the four regulations and of my responses thereto.

With the permission of the chairman and the members of the committee, I would ask that my prepared statement, with the exhibit appended thereto, be filed for the record.

Chairman **PERKINS**. Without objection, it will be agreed to.

[The prepared statement of Secretary Hufstedler follows:]

PREPARED TESTIMONY OF HON. SHIRLEY M. HUFSTEDLER, SECRETARY, U.S. DEPARTMENT OF EDUCATION

MR. CHAIRMAN and Members of the Subcommittee:

It is a pleasure to appear before this distinguished subcommittee this morning. I welcome the opportunity to discuss the issues arising from the resolutions disapproving four sets of regulations published by the Department.

There are two very different kinds of issues before us today. The first is a fundamental dispute over the Constitution and the separation of powers. It is a dispute that predates the Department of Education and, indeed, this Administration. The Assistant Attorney General has ably explained the Administration's position on this issue. As a member of the Executive Branch, I accept and am bound by that position.

There is, however, a second set of issues to be aired today. These issues are not ordinarily the stuff of headlines and landmark cases, but they are important. They concern three Education Department programs and the Education Appeal Board. Like the constitutional debate, these issues predate the Department. The four regulations were proposed for comment and published in final form by the Department of Health, Education and Welfare before the Education Department came into existence. Many grant applications for fiscal 1980 were also solicited and received by HEW before the Education Department was born and before Congress expressed any disapproval of the rules.

The disapproval resolutions, however, were all adopted in the first weeks after the Education Department opened its doors. I immediately requested the advice of the Attorney General on the legal effect of these resolutions.

When the Attorney General ruled on the constitutional question, I instructed the Department to begin enforcing the regulations, as his opinion required. At that point there was simply no time to make further adjustments in the regulations to meet Congressional concerns and still make our grants. At the time of the passage of the veto resolutions, we had more than 280 applications pending in the Arts in Education program; panels of field readers finished the process of reviewing and ranking these applications on almost the same day that the disapproval resolution was passed. Shortly thereafter, we received 160 applications under the Law-related Education program. All of these applications were submitted under the regulations identified in the veto resolutions. The applicants needed our final decisions quickly so they could make hiring decisions and take the other steps necessary to start up their projects for the coming school year. If we had amended the regulations and reopened the competition, no orderly planning process would have been possible. In fact, it is very unlikely that we could have made awards before the end of the fiscal year, when the funds would have expired.

As the regulations were being implemented, however, I also began an immediate review of all four regulations and the Congressional complaints about them. The Administration's constitutional position does not prevent the Department from reconsidering its regulations in the light of Congress' expressed concerns. If we are persuaded that our policies are in error, we may change the regulations, so long as we do so in a responsible and orderly manner that conforms to the law. I began the review because I take very seriously any adverse comment by Congress concerning our regulations or our regulations process. At the same time, I also undertook to organize the Department's liaison with Congress and to establish a new design for the Department's regulations procedures. These initiatives are now complete, and I am here to discuss their results.

Regulations Process

Within the past month, I have established a new regulations process designed to meet the Department's needs. A regulations system must serve many goals. It must be speedy; it must avoid unnecessary regulatory burdens; and it must be responsive to the comments of the public and Congress. One of the foremost objectives of the new Department's system is to obtain and take into account the concerns of all parties, well in advance of final adoption. Therefore, our procedures are designed to ensure careful attention to legislative intent and congressional concerns. The Office of Legislation, headed by Assistant Secretary Martha Keys, will review copies of all draft regulations and will have the opportunity to identify particular Congressional concerns.

In addition, I believe it would be profitable to increase the dialogue between the regulations drafters and the Congress. The earlier this dialogue begins, the more helpful it will be. Of the four disapproval resolutions we are discussing today, three were passed after the 45-day period had elapsed, under the Department's reading of the statute. The fourth was passed only 14 days before the period ended. The Department can seldom respond meaningfully when Congressional concerns are expressed at the very end of the 45-day period. During this period the Department may reconsider its regulations. After it ends and the rules take effect, no changes may be made without following the rulemaking procedures of the Administrative Procedure Act. I urge this Committee to work with us to develop a more effective "early warning system".

Even better would be a process that involved Congress as soon regulations are first proposed. For such a process to be effective, however, we must receive Congressional comments during the public comment period.

I am also committed to a regulations process that scrutinizes every regulation for opportunities to reduce burden and paperwork. Two Assistant Secretaries within the Department will examine each regulation for opportunities to reduce regulatory burden and paperwork. The Deputy Under Secretary for Intergovernmental Affairs will also receive copies of draft regulations to review for their possible impact on State and local governments.

We have already made some progress in the area of reducing regulatory burden; the Department has proposed a rule eliminating federal rules on college tuition refund policies and substituting standards developed and adopted by voluntary postsecondary associaations. In addition, I am also examining existing and proposed regulations for ways to use innovative regulatory techniques to ease the regulatory burdens on schools and other institutions. One idea that has promise is exempting schools with very low loan default rates from the elaborate "due diligence" procedures in our National Direct Student Loan rules. If we did so, schools with a proven track record in preventing default would be allowed to experiment with other less burdensome but higher-risk default-prevention methods, while schools with mediocre records would have an additional incentive to excel.

We have also made some progress in reducing the length of regulations. For example, in adopting HEW's procurement regulations, the Department was able to eliminate more than 100 pages of unnecessary provisions.

Finally, I believe that a regulations process should be speedy. I am quite aware that lengthy delays in issuing regulations were a potent argument in favor of creating the Education Department. I have largely eliminated the serial clearances that helped to produce these delays. A Deputy General Counsel has been charged with primary responsibility for regulations matters, including maintaining a speedy process. I am aware that Congress has set a 240-day deadline for education regulations growing out of new legislation. In the past, this target date was rarely if ever met. I recently signed and sent to the Federal Register proposed rules to implement the first education bill to require regulations since

I have been in charge of the Department. If the regulation continues on its current schedule, the 240-day deadline will be met.

In respect of the four regulations that are the subjects of this hearing, I share many of the concerns expressed by Congress. I have therefore signed and sent to the Federal Register one final and two proposed amendments to the regulations. One of these was published on September 3d; the other two will be published in the next few days. I can provide you with copies today if you wish.

ESEA Title IV-B regulations

Now let me turn to the regulations that brought us here. First are the Title IV-B regulations governing grants to States for educational improvement, resources, and support. The question is whether schools may use program funds to buy gym equipment. The legislative history of the program suggests Congressional qualms about this practice, and the proposed rules would have prohibited it. In response to wide-spread public comment, however, the final rule was changed to permit such purchases under certain circumstances.

Although the question was not free from doubt, after examining the statute and legislative history, I became convinced that purchasing gym equipment with Title IV funds was probably not intended by Congress. The solution was a relatively simple amendment, very similar to the provision that was originally proposed. Unlike the other changes to accommodate Congressional concerns, this amendment could be made immediately. We had already offered the public an opportunity to comment on a rule prohibiting such purchases; the Administrative Procedure Act was satisfied. We could publish the change as a final rule, and we did.

Education Appeal Board regulations

The regulations of the Education Appeal Board deal with appeals by States and local agencies from the audit decisions of Department officials. These appeals may be filed only after a final audit determination. Those who do not file an appeal lose all of their administrative and judicial remedies. Thus, the filing of an appeal is a crucial step, with millions of dollars often at stake.

The statute creating the Education Appeal Board sets a filing deadline of thirty days. However, our experience with the Board has revealed the need for occasional exceptions. Sometimes States or local governments face unexpected emergencies that make a timely appeal impossible. Sometimes complex issues make it unreasonable to demand a complete statement of the case in thirty days. And sometimes States or local governments file timely appeals that do not meet the Board's standards; by the time these are returned and rewritten, the thirty-day period has expired. In the past seven years, we have had 22 cases in which an extension of the appeal date was necessary for reasons of this sort.

The Department is concerned with speedy appeals, but we have uncovered no case in which granting an extension of the thirty-day deadline delayed a Board proceeding.

I am satisfied that such extensions are within our legal authority as well. The Education Appeal Board is the direct descendent of the Title I Audit Hearing Board, which was administratively created within the Office of Education in 1972. Like the Education Appeal Board, the Title I Audit Hearing Board set a thirty-day appeal deadline. It also permitted extension of the deadline for good cause. It operated efficiently under those rules for several years.

When the Administration decided that the Hearing Board should be expanded and given specific legislative authority, it drafted a bill to do so. The bill was adopted without substantial change by Congress as part of the Education Amendments of 1978. Neither the Administration's proposal nor the enacted law contained a specific authority to extend the filing deadline; but both contained a provision allowing the Board to prescribe rules to govern its proceedings, including rules about such matters as the "notice of the issues to be considered." Neither the Administration nor the Congress expressed any intention to abandon the Title I Audit Hearing Board's consistent practice of extensions for good cause. Certainly the legislative history shows no desire to require States and local governments to forfeit enormous claims if they cannot meet the thirty-day deadline despite good-faith efforts to do so.

Arts in Education and Law-related program regulations.

The remaining two regulations did not lend themselves to a simple or immediate amendment, primarily because Congressional criticisms were more wide-ranging. In the arts education program, the regulations were criticized for inflexibly requiring that applicants integrate four major arts into the curriculum, for requiring that applicants establish an advisory committee of local community leaders, and for requiring that applicants match the Federal contribution with resources of their own. The law-related education regulations were also criticized for imposing a matching requirement, for limiting Federal support for projects to four years, and for creating four separate subprograms out of a relatively simple statute.

We should not lose sight of the fact that all of these requirements serve important and proper program goals. The matching requirement and the four-year limit, for example, are designed to ensure that the Federal government does not simply "rent" projects that have no chance of surviving once Federal funds end. About a million dollars have been appropriated for each of these programs. With an appropriation of this size, we can only use a "seed-money" grant strategy, which these requirements were meant to further. Similarly, the advisory committee requirement grew out of extensive program experience showing that such committees provide a valuable community base that helps to ensure local support when Federal funding dries up. The four-arts rule also reflected an important policy. Most schools already teach visual arts and music; the greatest need in arts education is for projects that integrate a broader spectrum of arts into their curricula.

I do not believe, however, that the Department should impose requirements whenever we see a problem that needs solving. Rigid requirements stifle imagination. They prevent applicants from showing that their projects should be funded even though a requirement has not been met. With this in mind, I have signed and sent to the Federal Register a new set of proposed regulations for both programs. The new regulations are substantially shorter than before. The law-related education regulations, for for example, are half as long as the earlier version, primarily because three of the four "subprograms" have been consolidated into one set of selection criteria.

Most importantly, all of the requirements that this Committee criticized have been eliminated. Instead, the goals they sought to achieve--such as community support and ability to survive when Federal funding ends -- have been stated in general terms as selection criteria. Thus, instead of being required to match Federal funds, applicants will simply be judged in part on whether their project is likely to continue without Federal funds.

Applicants can demonstrate this by showing a substantial financial commitment to the project or by presenting some other evidence that the program has good prospects for survival. Other applicants may wish to argue that their projects are so innovative or valuable in other ways that poor prospects for survival are outweighed. By speaking in terms of goals rather than specifying the methods for reaching these goals, and by allowing applicants to compete even though they do not meet a detailed set of requirements, we hope to make use of applicants' imaginations and restore a needed flexibility and simplicity to these programs.

Although I believe that this is an appropriate solution to the problem, I do not claim to have a monopoly on wisdom. The Department needs your advice and the advice of others concerned with these programs. Because this new departure requires a major restructuring of the regulations for both programs, the rules must be published for comment before taking effect. I am sure that further changes will be made as a result of comments, and I welcome any suggestions you may make, as a committee or as individuals, for improving the proposed rules.

Again, I appreciate the opportunity to testify this morning and I will be pleased to answer any questions you may have.

THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

SEP 4 1980

MEMORANDUM

TO : Addressees

FROM : The Secretary

SUBJECT: Regulations

The regulations that are written by the Education Department have great importance, and we must have a regulations process that recognizes this fact. After consulting with many of you, and taking into account the views expressed in several meetings on this subject, I have decided on a regulations process for the new Department. A summary of the process is attached. These procedures will be subject to re-examination at the end of the year. For now, however, they are Department policy.

Any design for the regulations process must serve many goals, but five concerns received the highest priority in designing this system.

First, our regulations must reflect Congressional intent regarding the law being implemented. We must formalize a process which ensures that this condition is met. The Office of Legislation will play a major role in guaranteeing that Congressional concerns are considered during the regulations drafting process.

Second, we must always be alert for opportunities to reduce the burden our rules place on the affected community. The spirit and letter of Executive Order 12044 require no less; and I am personally committed to eliminating excessive regulation. This will be the responsibility of every program office. In addition, the Office of Management will be examining every draft rule with a view to reducing paperwork requirements, while the Office of Planning and Budget will be doing the same to reduce other kinds of regulatory burdens.

Third, the regulations process must be speedy. Reauthorization regulations, in particular, must be issued rapidly. I am committed to a major reduction in the length of time it takes to issue rules. This year's higher education regulations will be a crucial test of that commitment. The Under Secretary will be working with the Assistant Secretary for Postsecondary Education and the regulations staff to ensure that those regulations are processed on schedule.

Fourth, the regulations process must be premised on respect for the judgment and responsibility of principal program officers. The new design reflects the principal program officers' basic responsibility for the regulations in their areas of expertise. In addition, the design will permit me to experiment with the delegation of particular regulations to program officers. These delegations will be for a limited period--180 days--in order to encourage the rapid processing of delegated rules. The General Counsel will be actively seeking out opportunities to employ this new provision.

Finally, the process must encourage the participation of all parties affected by our regulations. Again, this responsibility belongs primarily to the principal officers. The Deputy Under Secretary for Intergovernmental Affairs will assist in assuring the participation of State and local governments, working closely with the Intergovernmental Advisory Council in Education.

Working as a team, we can meet these goals. I ask all of you to cooperate in the endeavor. The chief features of the new system are as follows:

- Regulations management and mediation will be the responsibility of the General Counsel, who has established an Office of Regulations, headed by a Deputy General Counsel. This office will provide some drafting assistance and legal analysis of regulations issues. It will also handle legislative drafting and clearance of bill reports, a combination that should make for a more efficient use of legal and clerical resources.
- Each principal officer will have a single adviser from his or her staff who is able to act for the officer on regulations and bill reports. In program offices, this Regulations Officer will also oversee regulations drafting.
- The Under Secretary will have special responsibility for overseeing the regulations process.

- Regulations will be divided into three categories:
  - -- Major: those imposing very large costs on the education community;
  - -- Significant: those affecting more than 500 recipients or $50 million in appropriations; and
  - -- Routine: or ordinary rules, including many ministerial and minor changes in existing regulations.
- Regulations proposals will be required only for "Major" and "Significant" regulations that are not required by legislation.
- We will experiment with delegating "Routine" regulations to the principal program officers for 180 days.
- Public participation techniques will be tailored to each category.
- Regulations resulting from reauthorization statutes will be produced by drafting teams operating under a comprehensive plan and schedule, supervised by the Under Secretary.
- Schedules will be written for each set of regulations and monitored by the Executive Secretary.

To put these general guidelines into effect, I am asking the principal officers of the Department to take the following steps:

- Each principal officer will name a Regulations Officer, who will be responsible for reviewing regulations. This person should also be responsible for reviewing bill reports and legislation unless the principal officer feels strongly that the functions should be separated and names a legislative contact. These names should be sent to the Executive Secretary and the Deputy General Counsel for Regulations by September 5, 1980.

- Each principal program officer will assign to the Regulations Officer the task of monitoring all regulations being prepared within the program office. The Regulations Officer should also have authority over the regulations drafters in each office. Please identify those individuals in your office who have regulations drafting responsibilities, and how you intend to structure their reporting relationship to the Regulations Officer, in a brief memorandum to the Executive Secretary and the Deputy General Counsel for Regulations by September 12, 1980.

- The General Counsel will circulate to all Regulations Officers a package of sample formats for Regulations Action Memoranda by September 12, 1980.

Our meeting on the regulations process raised two related issues that need further study --how to deal with unpublished policy guidance and how to prevent published regulations from becoming a straitjacket for both the program offices and the recipients. Two task forces will be established to deal with these questions:

- The General Counsel will lead a group--including representatives of the Assistant Secretaries for Management, Planning and Budget, Legislation, Civil Rights, and Elementary and Secondary Education--to study ways of controlling, gathering, and indexing unpublished policy guidance.

- The Assistant Secretary for Management will lead a group--including representatives of the Assistant Secretary for Planning and Budget, the Deputy Under Secretary concerned with intergovernmental affairs, the General Counsel, and the Assistant Secretary for Educational Research and Improvement--to explore ways of increasing regulatory flexibility consistent with law and prudence. A special assistant to the Secretary will help staff the group.

I look forward to receiving your imagination, cooperation, and dedication in making our Department's regulations process a model within the Federal Government. Thank you.

Shirley M. Hufstedler

Attachments: Explanatory Charts

SUMMARY OF STEPS IN THE ED REGULATIONS PROCESS

1. For "Significant" or "Major" regulations not required by legislation, a regulations proposal is sent to the Secretary, who may disapprove the proposal or request issues papers. Approved proposals return to the proposing office, which prepares a draft NPRM (notice of proposed rulemaking).
2. For other regulations, the first step is a draft NPRM package--including a preamble and a regulations action memorandum--prepared by the office that administers the affected program and submitted to the Regulations Office in the Office of General Counsel.
3. The OGC Regulations Office circulates the draft NPRM package to the Office of Management, the Office of Planning and Budget, the Office of Legislation, and other affected offices for comments and objections.
4. The Regulations Office transmits the draft NPRM package, along with any comments and objections, to the Secretary.
5. The Secretary decides whether the proposed regulations should be published or revised.
6. Approved NPRMs are published in the FEDERAL REGISTER for public comment.
7. The program office collects, summarizes, and responds to public comments in a draft preamble or appendix to the final regulations; it makes any changes it believes are necessary in light of public comments.
8. The program prepares and sends to the Regulations Office a draft final regulations package, including a new preamble and new Regulations Action Memorandum. The Regulations Office circulates the draft final regulations package to affected offices for comments and objections.
9. The Regulations Office transmits the regulations package, including any unresolved comments or objections, to the Secretary, who decides whether the regulations should be revised or published.
10. When regulations have been approved, the Regulations Office sends them to the FEDERAL REGISTER for publication and transmits copies of the regulations to the Congress for review.

CLASSIFICATION AND CHARACTERISTICS OF DEPARTMENT OF EDUCATION REGULATIONS

What are the types of regulations?	How is each type of regulations defined?	What are the requirements of Executive Order 12044?	Is a regulations proposal required?	Is an issues paper to the Secretary required?	Is a formal public participation plan required?	What is the duration of the public comment period?
Major	Regulations are classified as "major" if they-- ● Cover highly controversial or high impact programs; ● Cost affected parties at least $100 million annually; or ● Increase costs in one sector of the economy by 10% annually if that increase exceeds $10 million. At the Secretary's discretion other regulations may be classified as "major" on the basis of potential savings, potential controversy, uncertainty in initial estimates or other factors.	Executive Order 12044 requires -- o Plain English; o Public participation; o Burden reduction; o Regulatory analysis; o Consideration of alternatives.	Yes, unless regulations are required by legislation.	Generally yes.	Yes. The plan will include any public participation in the notice of proposed rulemaking, as well as a description of further participation in the development of the regulations.	60 or more days.
Significant	Regulations are classified as "significant" if they -- ● Impose conditions or requirements on more than 500 recipients (including sub-grantees in State-administered programs); ● Involve more than $30 million in Federal appropriations; or ● Are likely to affect significantly a large part of the educational community.	Executive Order 12044 requires -- o Plain English; o Public participation; o Burden reduction; o Screening for need for a regulatory analysis; and o If necessary, a regulatory analysis.	Yes, unless regulations are required by legislation.	Generally no.	No	60 days.
Routine	Regulations are classified as "routine" if they do not meet the definition for either major or significant regulations.	Executive Order 12044 requires -- o Plain English; o Burden reduction; o Public participation (optional).	No (However, program may prepare a regulations proposal if it wishes.)	Rarely.	No	30-60 days. The Secretary may waive public comment for minor technical regulations.

Secretary **Hufstedler**. Instead of reading that testimony I prefer, if it pleases you, that I shall speak extemporaneously.

Chairman **Perkins**. Go ahead.

Secretary **Hufstedler**. We are brought here on the basis of four regulations and on two major sets of issues. The first is the constitutional question which has been previously discussed at substantial length.

The second is a question related to the procedures of the Department of Education in dealing with regulations. I shall not dwell on the constitutional issue because it has been debated at length. Of course, we are aware that this kind of constitutional question has been lurking for many years dating back at least to 1932.

We are not going to resolve those issues here because ultimately, as all of us agree, it is a matter for consitutional adjudication by the U.S. Supreme Court.

I would only pause to say both as a matter of political philosophy and as a matter of legal philosophy, I think every effort must be made to avoid constitutional collisons between branches of Government.

I turn now to the regulations in question, the timing of these regulations, the proceedings that followed and the responses that I made.

All these regulations were promulgated in final form and published in the Federal Register before the Department of Education was born. All of these regulations were promulgated by HEW.

With respect to three out of the four regulations, the 45-day period during which the regulations are lodged with the Congress had also expired before the Department was established.

That becomes of significance in terms of both statutory and practicable responses. When the Department was created on May 4, 1980, the Department came into existence and as of that date for the first time had responsibility for the regulatory mechanisms.

Prior to that date, with respect to all of the funded programs, there had been a whole process by which grants were made to recipients of the program funds, authorized by the legislation pursuant to which the regulations were promulgated.

When, under the Administrative Procedures Act, I became aware that upon expiration of the 45 days any substantive change in a regulation must go through the entire regulatory mechanism from scratch, I became deeply concerned about the fate of the grantees: the fate of local schools, colleges, and other grantees if any substantive changes were made.

With respect to each of these programs, that is Arts Education and Law-Related Education, which were funded programs, as well as ESEA Title IV, various kinds of grants had already been processed.

If any substantive modifications were made in the regulations, the Adminstrative Procedures Act requires that we start the procedure over by producing a notice of proposed rulemaking, by allowing the appropriate period of public comment, by publishing a final regulation, and ultimately by bringing that final regulation to the attention of Congress for a period of 45 days.

The combination of the status of these regulations under that timing meant, as a practical matter, that we could not have given grants to those persons who would be entitled to them under the existing regulations or any modified regulations during the entire fiscal year because it would have been impossible.

I received word virtually days after the Department had been born that Congress had decided to veto these regulations. I was then compelled to make a choice. Even though I had not had any opportunity to participate in that regulatory process, even though this Department had had no opportunity to engage in the kind of appropriate liaison work, which is necessary in order to avoid any such constitutional confrontation, at that juncture I was faced with a constitutional question. I was fully aware that the administration had consistently taken a position that denied the constitutional authority to Congress to veto regulations.

I was also aware that the controversy had had its genesis at least as early as 1932, that the issues were pending before several courts, none of which had been resolved. I was also aware that if I respected the congressional veto, thereby denying what I knew was the policy of the administration, I would also be provoking lawsuits to raise exactly the same constitutional issue by those grantees who were disappointed.

I, therefore, requested a formal opinion of the Attorney General with respect to those regulations. Whatever may be the merits of that constitutional confrontation—and I have no intention of commenting about the merits—ultimately that issue must be resolved by the courts.

I, of course, was distressed that Congress chose to exercise that power at a time when the Department could not effectively respond either by way of then modifying the regulations without violating the administration position or having any opportunity to discuss them with Members of Congress.

Nevertheless, it was necessary to take into account that constitutional issue, together with the statutory issues I have already mentioned, combined with the reality as far as I could see, that whichever way I went a potential lawsuit would be engendered which would raise the identical constitutional question.

I took a position which I believe was a responsible one by calling for an opinion of the Attorney General whose response is very familiar to you. According to that opinion, which, as you are well aware, binds me as a member of the administration, I, therefore, notified the officials of my Department and, of course, the Congress that I would have the regulations enforced in spite of the congressional veto.

Nevertheless, I take very, very seriously any comments by Congress which question the validity, the effectiveness or the basis of any regulation which this Department promulgates.

I immediately called for a complete review of the entire background of those regulations and I studied them myself. I made further decisions based on an intensive examination of the history of those regulations and the congressional response to each of them.

Because the statutory period in which we could make substantive changes had expired, I decided that it was statutorily my duty to respond to all the congressional concerns issuing a notice of proposed rulemaking for each of those regulations on which public comment was necessary, that is, the arts-in-education program, and the law-related education program.

Those regulations were drafted, they have been proposed, and are now at the Federal Register awaiting publication. They are available to every member who is interested.

Each of those regulations as now proposed meets all of the concerns expressed by this committee. All of the provisions which were deemed objectionable have been removed.

Item two, title IV, was in a somewhat different situation. The legislative history, coupled with the statutory language, was not free from doubt about whether Congress intended or did not intend to permit the funds to be used for the purpose of purchasing gymnasium equipment as well as musical equipment when both such items by the school districts were supposed to be a part of an academic instructional program.

The regulations that were vetoed by Congress permitted use of those funds to purchase both athletic equipment and musical instruments. Upon a meticulous review of the entire legislative history and the statute, I concluded that it was more probable than not that Congress did not intend to fund the purchase of gymnasium equipment.

I determined, however, that it was not necessary to send out another notice of proposed rulemaking because the original notice of proposed rulemaking had forbade the use of the funds for gymnasium equipment. After public commentary was received, there was a determination that both should be funded. I decided that decision was not correct and that we could immediately modify the regulation without violating the provisions of the Administrative Procedures Act.

I, accordingly, made a virtually immediate correction of those regulations meeting the concerns expressed by Congress, which I believe, conforms with the Administrative Procedures Act. I did not change my views to avoid the constitutional issue that had already been raised by the Attorney General of the United States.

The fourth regulation stands in a somewhat different category because it did not involve a funded program. The question in that instance was whether or not the regulation allowed on extension of time beyond 30 days upon good cause shown in the interest of justice. Reliance on the literal wording of the statute with respect to the 30 days may or may not produce a correct interpretation of the statute. I construed the statute in the light of its legislative history to decide that the regulation was a correct interpretation of the statute.

I am aware of the questions asked by Mr. Kramer, and if he wishes to ask them to me, I will respond as to all of the reasons I reached that conclusion.

In summary, I responded to the Congress as rapidly as possible to each and every one of the congressional concerns, bearing in mind my constitutional obligations and the provisions of the statutes other than the statutes for which Congress had disapproved regulations, and I responded as well as I could to each and every concern in the fastest possible way, as follows:

One, by producing a notice of proposed rulemaking in the two programs that I mentioned; two, making an immediate correction where there was no substantive change and where the Administrative Procedures Act had been followed and; three, reviewing and upon meticulous consideration, reaffirming the position of HEW that the statute should be appropriately construed to permit an extension of the 30-day period when good cause was shown in the interest of justice.

In addition to that and at the same time, I was, of course, building the Department, creating a strong legislative office under the direction of one of your former colleagues in Congress, Ms. Martha Keys; and establishing a procedure for complete review of the regulatory mechanisms witin the Department.

Those regulatory mechanisms have now been reformed very significantly. The details of these changes, although not lengthy documents, are appended to my prepared testimony for your scrutiny and consideration.

I can assure every member of this committee that I intend, as I have always intended, to work very closely with each Member of Congress and I will personally respond at any time to avoid any kind of constitutional conflict.

In the interests of the Government to which Mr. Ford has addressed himself, it is incumbent on all of us not to provoke any such confrontation. It is not a fight anyone can properly win because that is not the way to run a government.

I am very sorry that it was not possible in view of the timing of this set of disputes that I personally could not have avoided the whole matter entirely. That, I think, gives you a quick overview of what I did, why I did it, and why we are here.

Chairman PERKINS. Thank you very much.

Mr. FORD. Thank you, Mr. Chairman. I enjoy welcoming the distinguished Secretary here to testify on the positive approaches she has adopted in a very short time. She has directed these things in working toward putting the Department effectively in the forefront of education.

All of our experience with you, Madame Secretary, indicated that you were a strong advocate for the programs which had been entrusted to you for administration. I don't think that anybody would quarrel with the demonstrated motivation on the positive side which you have shown all along.

We are saddened that somebody along the line decided the place to start testing this movement that has been underway for a number of years in the Congress on regulation writing should pick on your Department and on you as a result of the people in your Department.

We on this committee are conscious of the fact that HEW left you with a whole bag of snakes to kill when you took over. They started cranking things out down there in those last months like they were trying to load so much on your plate that you would never be able to handle it.

We do understand you were placed in a position of trying to respond to a whole lot of executive decisions which stretched back over a period of time in which neither you nor the people surrounding you had participated.

My own experience as a subcommittee chairman on this committee has been that you and your Department have been totally responsive to our committee in every instance in which we have sought consultation with you.

We have had disagreements about the form of legislation and have resolved them in every instance, in my opinion, in a way that satisfied everybody that there was a fair and proper discussion, and that when you were right, you were indeed accommodated by the form of the final legislation.

It is precisely because we have that kind of relationship that we have with you that many of us feel distressed that the executive branch in effect would want to build a fence between us.

This provision was written in a bipartisan effort by this committee. It is kind of interesting to reflect back on it. The Republicans on the committee were under great pressure to support their President and their executive. What Republicans discovered was that their President and their Executive were being hamstrung by an angry Congress. This committee, for example, spent years putting programs into effect that in a very short time the Nixon administration dismantled and destroyed.

It produced very strong reactions. So we started spinning programs off and rewriting Executive powers and creating bureaus and departments.

The first thing you know, we were legislatively running a good deal of what should have been the day-to-day decisionmaking activities of the Secretary of HEW. That was also bipartisan because the anger at what we thought were extreme actions on the part of the Executive came from both sides of the aisle.

The Republicans joined with us in enacting what appeared to be a limitation on the Executive for a very good reason. While it appears to be a limitation on the Executive power to an outside observer, what it really did was give us a way to resolve problems with a tack hammer instead of using a sledge hammer.

Unfortunately that is, what the Justice Department totally overlooks in this, in that this provided us with a mechanism to avoid having legislation carry riders and amendments of one kind or another every time there was an unpopular decision down on the other end of the street.

The committee has been restrained. The example I'll point to again is the title IX regulation. We wrote title IX. It took the administration 3 years to come up with the first set of regulations. We looked at the regulations and knew immediately we were going to have some trouble with them. But we also recognized that we had an administration which didn't really like the whole idea of title IX when we passed it, and that if we sent it back to them, it might be 3 more years before we could start the implementation.

So even though this committee did not like the regulations that were sent up and saw in them the kind of trouble which we later had with respect to athletics, we decided to let it go because it would have been, in the opinion of some of us, a potential excuse for people on the other end of the street to sit on our legislative objective for another 3 years. The intransigence and the stalling that can take place in this process basically cuts both ways.

We have to recognize that if we send regulations back to you and someone in your Department thinks we are wrong, we could be sending them back into a state of limbo.

We are at the mercy of the executive branch in those terms.

What would happen if that took place I suppose is evidenced by what happened in the early seventies. We would write into the law very specific and detailed provisions and find they worked in 15 States and were an abomination in 10 others, and the Secretary couldn't do anything about it.

So, while on its face this provision of the law appears to be a restriction on the executive branch imposed by the Congress, it really has the effect of preventing more serious confrontations.

Chairman PERKINS. Let me interrupt you just a minute.

Notwithstanding your excellent questioning—which is really beneficial—we have a 1 o'clock school lunch conference with the Senate. We have—you and I both—the reconciliation of the budget at 3 o'clock. I wonder if we can narrow our questioning to about 5 minutes around?

Mr. FORD. Thank you. I was about to conclude, Mr. Chairman.

I want to assure the Secretary that I don't detect on this committee, in any quarter, any antagonism toward you or your Department because of the circumstances that bring us together here today.

Chairman PERKINS. Mr. Goodling?

Mr. GOODLING. Thank you, Mr. Chairman. I would like to ask or comment on a couple of things that the Secretary had in her testimony and then, if I might, ask Secretary Scanlon just to briefly mention our problems so that I can ask her two questions about that.

It is unfair to ask until she hears what the problem is.

First of all, I had concern about your comment that Congress went beyond the 45 days. If my arithmetic is correct, we had 42 days, 26 days, 44 days.

I can't find the other one at the present time.

Secretary HUFSTEDLER. We will supply you with the detail after the hearing which gives you the complete chronology.

I recognize, Mr. Goodling, by the way, that there is a question whether the 45 days begins to run from the date of publication of the final regulations in the Federal Register or the date of transmittal to Congress.

That is an unresolved issue.

We have construed it as running from the date of publication of the final regulations in the Federal Register.

Mr. GOODLING. I assumed it is from the day of submittal.

Secretary HUFSTEDLER. That is the reason we have a difference. There is a reasonable basis for a difference of views on the correct interpretation of the statute.

Mr. GOODLING. You make a statement that you didn't have enough time after the regulations were disapproved. There just wasn't that kind of time to adjust. I realize that you personally didn't have that kind of time, but the reason all of this was delayed, I think you would have to admit, was that the administration spent all sorts of time getting these regulations to the Congress or in print, as a matter of fact.

I realize you didn't have that kind of time, but that doesn't answer for the administration who had all sorts of time to get those regulations before us and then they would have had a lot of time to change them if, in fact——

Secretary **Hufstedler**. Mr. Goodling, I do not intend to defend history that I did not make.

Mr. **Goodling**. I understand that. I am just pointing out that the problem was not with the Congress of the United States. The problem was, as a matter of fact, with HEW prior to your time procrastinating and not writing regulations or there would have been no problem.

In fact, it may not even have been a confrontation in your administration.

Secretary **Hufstedler**. It would have been a fine and happy day if I hadn't been confronted within 10 days after the Department was formed, finding myself in the middle of a long-time constitutional match, to use—and I don't mean it at all frivolously—I was just flying by and suddenly found out I was the birdie in the middle of a constitutional badminton game which is a little unnerving.

Mr. **Goodling**. All I am pointing out is Congress would have been very happy, also, had we not had to, at this last minute, made the decision we did. I only hope that you fired all of those people who sat on their duffs when they should have been writing regulations and should have gotten them out to us so, in fact, it all would have been taken care of before you landed.

Secretary **Hufstedler**. Mr. Goodling, I can only respond that we have been able to perform the procedure. I don't think very many people are beyond redemption.

Mr. **Goodling**. That is questionable. I talked to some ministers who have a difference of opinion.

You made several references in your testimony—and furthermore, before I ask this, I might say that you had to sit there a long time this morning, but I think it was an ideal way to move, because all the wrath that my colleagues may have been bestowing upon you—poor Mr. Harmon had to take it. I think it was a good maneuver.

At any rate, you made several references to increasing the dialog with the Congress, with the committee. The question I would ask concerns your response to the red flags that would be raised in time for you to do something about it.

My question is, How much red did you see in the flag the chairman sent you when he sent that letter indicating that we were going to have some real trouble with some of these? Did that carry——

Secretary **Hufstedler**. I treat that as a sunrise kind of red, not a sunset kind of red. As a matter of fact, I am confident that we can work very happily with this committee.

To be sure, we are going to have occasional differences of view, but I think we can work very effectively together to be sure that we do not have such constitutional confrontations in the future.

Mr. **Goodling**. How much weight did you give to that letter?

Secretary **Hufstedler**. I give very great weight to every letter that comes from the chairman of this committee.

Mr. **Goodling**. I would hope so.

Secretary HUFSTEDLER. He deserves it. Because he is chairman. I am fully aware of the necessity, to review his views closely even if I were disinclined to give it great weight.

I am both inclined and appreciative.

Mr. GOODLING. One other question along that line.

You noted also in your testimony that there was so much response to this gym equipment provision and that apparently influenced you. How much influence does that kind of comment—how does it stack up against congressional intent or the legislation that we present to you? Because I must preface that by saying that you must remember that those who would have written with another opinion didn't have an opportunity to do that because they assumed from the legislation that there was no necessity for them to write; it was only those who then noticed that they were going to be hurt who had that quick opportunity to write.

Secretary HUFSTEDLER. Mr. Goodling, I can only respond that in reading the record of what happened in HEW, I was made aware of a great deal of public comment about it

I cannot answer for the degree of weight that HEW placed upon that versus whatever other expressions there were to HEW from the Congress.

I can tell you that I will pay, intend to pay, and do pay a great deal of attention to responsible comment from the public which gives us the kind of information that you need and we need in order to deal with this subject, but that does not mean that public commentary generally can or should outweigh the thoughtful questions and the thoughtful commentary by this committee or any Member of Congress.

Mr. GOODLING. I think the important word is "responsible." As I pointed out, only those who had an ax to grind or who were going to have part of their nest taken from them saw any necessity to write.

The others assumed the intent of Congress was going to, in fact, be the law. They didn't generate that letter-writing contest.

Secretary HUFSTEDLER. Well, Mr. Goodling, I surely agree with you that there may be quite different points of view about what is anticipated, but I can tell you that after many, many, many years of divining congressional intent. I have discovered that it is often easier to divine congressional intent by talking to the people who wrote the statute rather than depending entirely upon the literal words of the statute.

Mr. GOODLING. I have no problem with that. I would like to ask Secretary Scanlon if he would very briefly mention our problem so I can ask two questions.

Secretary HUFSTEDLER. Surely.

Mr. SCANLON. Thank you, Congressman Goodling.

Mr. GOODLING. Secretary Scanlon is secretary of education from Pennsylvania, who will be testifying later.

In order to ask her the two questions, I must ask that he tell her what the problem is. It affects many States.

Mr. SCANLON. Pennsylvania is involved in two title I audit cases dating back to the early seventies. There are a number of heirs in this room who inherited problems long before folks were involved in that operation.

I happen to be one of those as well.

Pennsylvania believes it is being penalized by actions of a title I board that lacked jurisdiction which was empaneled without statutory authority or according to rules that were never published, with sanctions which were not enacted into law until more than 5 years after the program was concluded.

As we indicated a little earlier——

Chairman Perkins. If I could, the members are not hearing you.

Mr. Goodling. Pull the mike closer to you.

Mr. Scanlon. Just to repeat, Pennsylvania is involved in two title I audit cases dating from the early seventies, and that our case is based on a belief we are being penalized by the actions of a title I board that lacked jurisdiction which was empaneled without statutory authority according to rules which were never published with a sanction which was not enacted into law.

Chairman Perkins. If the gentleman will yield to me, I know something about all of these alleged claims against the States. I have heard of instances where the States are penalized

I think we have to wipe that out of the legislation.

Mr. Goodling. I hope we would have hearings.

Chairman Perkins. We will have hearings.

Mr. Goodling. That is briefly what the problem is, Madam Secretary.

The question I have is, I think you have several options when it comes to correcting audit exceptions, as I understand the law.

Are you aware of other options other than punitive options, because that seems to be the only route we are taking.

Secretary Hufstedler. Mr. Goodling, I can only speak in this connection to the one case that has come up to me as secretary on a request of review by the State of Pennsylvania. The authority of the secretary to review decisions by the appeals board, or by its pedecessor, is extremely limited. It occurs only under extraordinary circumstances.

For the lawyers here, I put it in legal terms. It is an even narrower bit of discretion than is accorded in granting extraordinary writs. The secretary does not have the power under the statutory authorization to come to a different conclusion, without good cause..

It has to be a situation requiring extraordinary relief. Therefore, while there may be many remedies ultimately available, those remedies are not in the hands of the secretary in terms of exercising the powers of review given to the secretary to overturn the decision of an appeals board under the existing statutory law.

Mr. Goodling. In other words, you are saying they have the opportunity—for instance, there are four or five routes they can go. They can——

Secretary Hufstedler. That is right.

Mr. Goodling [continuing]. Have compliance agreements, withholding, disapproval of State application, cease-and-desist orders. This kind of thing.

Are you saying they had that jurisdiction but you do not?

Secretary Hufstedler. Well, there are several different sets of remedies some of them by officers to whom the discretion under the statute has been committed, and the kind of remedies that follow thereafter depend upon what the choices were in the first instance.

Now, some of these in the first instance are committed to the secretary to ascertain whether to go the statutory route to begin the cutoff of Federal funds. There is a whole set of regulations which the secretary thereafter files upon making that choice, but once either a predecessor secretary has made a particular choice and moved into position, all of the statutory machinery that follows from that choice a subsequent secretary cannot say that wasn't a very good idea, I wouldn't have done that.

The same thing is true if a different procedure is indicated by the choice making on the part of an SEA or an other litigant who takes a different kind of view.

Mr. GOODLING. Let me see if I can make this a little clearer from my standpoint. There are five or six routes to go. The only route that has been used is the punitive route.

In other words, send back 25 million, 36 million, 28 million, whatever it is, because you misused it.

There are five or six other remedies that could have been made.

Do you have any influence or authority in relationship to the remedy which is initially selected? In other words, why select the punitive confrontation?

Secretary HUFSTEDLER. Here again part of it depends entirely on the statutory authority given the auditing process in terms of whether there is an audit exception, and when there is an audit exception, about what procedure follows thereafter.

In some instances, of course—and I can't give you the exact detail about this because it is not fresh enough in my own mind to give you the exact statutory detail—but where there has been an audit exception, the body against whom that audit exception has been taken, if it cannot be resolved at the initial level, can seek review by an appeal board, and under extraordinary circumstances, by the secretary.

If dissatisfied with the results, the statutes permit an appeal to be taken to a U.S. court of appeals for the appropriate circuit.

In terms of some kinds of exceptions—not all exceptions necessarily—I don't know of any instances in which an audit exception can be handled this way—one can try to go the compliance route originally.

If that fails, one goes to a different set of statutory administrative procedures. I think I cannot be very sensible about answering your question with particularity unless you give me an exact situation and then I can provide you with details about what the statutory machinery is.

I would be glad to do that, Mr. Goodling, if you will ask me a question in writing. I will respond in writing.

Mr. GOODLING. I don't want to take any more time. We will get our testimony to you so that you can review that because there are 36 States involved. I guess all I am trying to discover is the pressure that the Secretary can put on the whole process so that it isn't initially a confrontation that maybe we use one of the other five approaches rather than the punitive kind of approach.

Secretary HUFSTEDLER. This is not a question free from difficulty, I might say. It is one of the peculiar situations in which the

Secretary of the Department is both the final arbiter of administrative proceedings, as well as a potential litigant on the other side.

In short, there are awfully peculiar conflict of interest problems here that are extremely difficult to resolve. I wouldn't attempt to resolve them at this time.

Mr. **Goodling**. I think the Chairman has the right idea. Maybe we can give you new legislation to give you a new slate to work with.

Secretary **Hufstedler**. I am always glad to be relieved of impossible problems by having Congress resolve them for me.

Mr. **Ford**. Mr. Chairman?

Chairman **Perkins**. Mr. Ford?

Mr. **Ford**. I wanted to inform the Secretary, I have my constitutional lawyer here now. We are getting all ready for a real confrontation.

Dr. Daniel Pollitt from the University of North Carolina law school, who is a consultant to this committee and a great constitutional expert just happened to come by. Do you have graduate students that can start on this?

Chairman **Perkins**. Do you want to make an observation, Dr. Pollitt?

Dr. **Pollitt**. No thank you.

Chairman **Perkins**. Mr. Biaggi.

Mr. **Biaggi**. Thank you, Mr. Chairman.

Welcome, Madam Secretary.

Frankly, if we had your statement made early on, we would have had less discussion focused on the constitutional problem because I don't think the constitutional problem may develop. The attitude is heartening, frankly. It bodes well for our respective relationships.

Your testimony indicates something really that is the crux of it.

First, our regulations must reflect congressional intent regarding the law being implemented.

We are heartened by that recognition and also heartened by the fact that you have one of our former colleagues on board with you. She understands and I am certain she will be of invaluable assistance to you.

The intent has often times been developed and misinterpreted and self-serving. That has been our experience in the past. We are hopeful that that won't be the way it will be under your Department. You make reference to that reflection. What will be the nature of your consultation with Members of Congress?

Secretary **Hufstedler**. I would hope that we can continue the process very fruitfully which we have begun under the reformed procedure which is now in place in the Department. Very early in the process of formulating the regulations, when they are regulations under the category of either important or significant, Members of Congress staffs, working with the staff from the Department of Education, could give thoughtful consideration to the regulations in the formulation process, bearing in mind, of course, that we do have to bear in mind what the kinds of responsibilities of the executive branch and the congressional branch are with respect to each other, but thoughtful consultation is, of course, highly valuable in reaching the best possible set of regulations.

Now, of course, it would impossibly burden the Congress if every single jot and title of regulations had to be reviewed by all the Members of Congress who were concerned with the initiating legislation. That is an impossible burden.

We have to deal with this rationally and in good sense.

After the regulations are in the notice of proposed rulemaking form, I very much welcome the chairman's suggestion that we obtain comment from Congress at the earliest time so that we can respond much earlier than trying to do so during a 45-day lay-on-the-table period, because the burdens on Congress are such that oftentimes that response cannot come along fast enough for us to meet our statutory deadlines.

So I am hopeful that we will able to do much better on that.

Mr. **Biaggi**. What is the policy of the Department when you have a disagreement between the legislature and the executive?

Secretary **Hufstedler**. Of course, it depends upon the nature of the disagreement and when it surfaces.

There are times, of course, when we would be violating potentially the division of powers between the judiciary, the Congress, and the executive branch if we yielded and arrogated to ourselves a particular kind of decision on an issue that was between us.

We have to then yield that ultimate decisionmaking to the judiciary, but there are many other instances in which we can work out differences very amicably.

Mr. **Biaggi**. With relation to consultations, how would that be operationalized with relation to bilingual and higher education regulations?

Secretary **Hufstedler**. Well, let's take them one at a time. In terms of the so-called bilingual regulations, there is presently a notice of proposed rulemaking is now in the period of extensive public comment.

I would hope to hear from Members of Congress as well during this period. Because we are dealing with Title VI of the Civil Rights Act and not with other kinds of education regulations, we do not have an identical procedure that we have in the regulations that are before us under discussion today.

We would, nevertheless, very much welcome conversation and the commentary by Members of Congress on that set of proposed rules.

With respect to the other aspects—just one second.

Mr. **Biaggi**. Higher education.

Secretary **Hufstedler**. Higher education. As soon as that legislation is passed, that is in the category of what we call important regulations. It will be under the immediate stewardship of Dr. Albert Bowker, Assistant Secretary of Postsecondary Education who will be working closely on a cross-cutting team with Ms. Martha Keys, Assistant Secretary for Legislation, and also with a liaison person from the General Counsel's Office.

I would request at the threshold that Dr. Bowker produce some decision papers for me on the direction of the regulations.

In addition, there are some subsets of that legislation, if it is passed, which fall within the competence of other program assistant secretaries, who shall also have an input into that process. We shall, when we have an early draft, when we have gotten to the point where we decided where the regulations are going to go, we will have regular liaison by the Legislative Affairs Office with the Members of Congress whose concerns are with higher education and that legislation so that we will have an opportunity to hear from you and receive your ideas as we go through the process of working out those regulations.

Then, of course, we move it into the part of the process which is a very familiar one. Those are proposed rulemaking, the public comment period, and all the rest.

Mr. BIAGGI. I am comforted by that process. I have several amendments that were incorporated into that legislation, one of which was to change the formula which would not penalize those progressive States in the distribution of SEOG—Supplemental Educational Opportunity Grant funds. Previously the Federal Government came in and the formula was established and the schedule worked out by the Office of Education.

It is one area in which at least the people of my State, and many other States, and institutions are terribly concerned about.

It is a step forward, it is bending the old formula which rewarded inactivity or lack of initiative in assisting in many—in educational efforts.

Secretary HUFSTEDLER. We shall certainly give any such views careful consideration. When the views expressed do carry out both the letter and the spirit of the legislation, which we must follow, of course, we give added weight. There are instances in which——

Chairman PERKINS. Mr. Biaggi, could we go ahead with the other witnesses, since we have this conference?

Mr. BIAGGI. I have one last question.

Chairman PERKINS. We will leave you here to take charge of the hearing.

Mr. BIAGGI. You are very generous, Mr. Chairman. I understand the honor you are bestowing upon me. I have legislation I will be offering—managing on the floor shortly thereafter.

I don't think I can take advantage of this great opportunity. I have one closing question.

Secretary HUFSTEDLER. Mr. Biaggi, with the permission of the chairman, perhaps you would like to submit the question in writing and I shall respond to it in writing?

Mr. BIAGGI. No problem. Thank you, Mr. Chairman.

Chairman PERKINS. Mr. Weiss.

Mr. WEISS. Thank you, Mr. Chairman.

I really don't have any questions to ask you, Madam Secretary. I simply want to express my welcome to you and tell you how impressed I have been by your stewardship of the Department which I was not in favor of creating.

I think you have done magnificently well.

Your testimony this morning, I think, does bode well for the cooperative effort between our committee and Congress itself and your Department.

I am sure that we will, in fact, be reaching out as specific matters and issues come up for our mutual concern.

Secretary HUFSTEDLER. Thank you very much, Mr. Weiss.

Chairman PERKINS. Mr. Erdahl.

Mr. **Erdahl**. Thank you, Madam Secretary, for being with us today. I am sorry I couldn't be here during most of your testimony. I have read it.

I yield back the balance of my time.

Chairman **Perkins**. Mr. Kramer.

Mr. **Kramer**. Thank you, Mr. Chairman. I appreciate your courtesy in allowing me, a nonmember of the subcommittee, to participate in the questioning.

Madam Secretary, I would like to ask you several quick questions, if I might.

The first is, you indicated that you were in the process of changing the regulations for the law-related program and the arts and education program to comply with congressional desires for fiscal year 1981.

Even though that may be the case, would you agree that with respect to those submitted grant applications for fiscal year 1980 that, for example, we are not able to come up with a match and therefore could not submit a grant application, that those parties had been injured by the difference in interpretation arising between the statute and the regulations as they exist at the present time?

Secretary **Hufstedler**. They have, in my view, suffered no legal injury because, in my view, the regulations which were theretofore promulgated were not in violation of the statutory authority.

In responding to the modifications suggested by Congress, I have done so not because I thought there was a violation of the statute in the prior regulations, but because I wanted to show in a very concrete way responsiveness to the concerns expressed by Members of Congress.

Mr. **Kramer**. I understand your position.

I thank you for your answer. If I understood your testimony—I am not sure I heard everything that was said absolutely correctly—but did you make the statement to the effect that it is your position that at least some of the veto action that we took over and above the constitutional issue was invalid because we did not act within the 45-day period?

Secretary **Hufstedler**. No. I was responding entirely to the constitutional question, it was not necessary to reach the statutory issue. The reference to the 45 days in the statutory authority was a means of explaining why the Department could not have given grants in the year with respect to the applications that had been received because the statutory limitations would require us to start the whole process over again.

If we had done that, none of the grantees could possibly have received any money during 1980.

Mr. **Kramer**. I understand what you are saying. You are not making the point in any way that—other than the constitutional question—that the legislative veto process in which we were involved failed because we didn't follow the proper mechanics?

Secretary **Hufstedler**. No. That is an entirely—that is on the constitutional grounds.

Mr. **Kramer**. Madam Secretary, I have one last question. That involves the area that I originally addressed. That was the legislative history on the Education Appeal Board statute concerning the 30 days.

In your regulations dated April 3, 1980, that appear in the Federal Register—and I don't know whether or not you have a copy of those with you.

Secretary **Hufstedler**. I don't have them right in front of me. Please go forward.

Mr. **Kramer**. Page 22643, they read as follows: I think this is especially notable. It is not very long. If you would bear with me for a few sentences.

> Comment: One commentator noted that the statute, unlike the regulations, did not allow an extension of time for filing an application for review.
>
> "Response: No change has been made. Although the legislation does not provide for an extension of the 30-day time period for filing an application for review, the title I Audit Hearing Board—the predecessor to the Education Appeal Board—found that some cases involved such complicated issues or so many different localities that 30 days did not allow appellant sufficient time in which to prepare the adequate application for review.
>
> The title I Board chairperson, having received a fair number of requests from appellants for extensions of the 30-day time period, attempted to accommodate the appellants if the request appeared reasonable.
>
> The Commissioner believes that the Education Appeal Board should have the same flexibility.

Now, if I read that section in the Federal Register correctly, there is no mention made there of legislative history that permits the extension to take place. There is an admission that, in fact, the regulation is inconsistent to some extent with the statute; but the further comment made that because, in effect, the congressional enactment is not wise, or judicious, or because it does not allow a fair opportunity for appeal that provision has been made to, in effect, accommodate that inflexibility in the statute.

Now, that is how I read that statement in the rules and regulations. I was wondering if you would comment on your perception?

Secretary **Hufstedler**. I will be glad to do so, Mr. Kramer. First, the literal language of that one provision of the statute is limited to 30 days. That is not at all an unusual provision in all kinds of Federal statutes, providing various kinds of time within which certain things have to be done.

That by no means is the end of the inquiry on the correct statutory interpretation. One must look at the parcel of legislation as a whole in which the provision appears and also look at it in the light of the entire legislative record.

Now, this question, of course, I must view from the perspective of many, many years on the bench. When the end product of giving a total, literal interpretation to one segment of a statute reaches results that are extraordinarily harsh or absolutely unconscionable, one has to ask the question, "Did Congress intend that?"

You answer that in connection with the totality of the statute, of which that segment was a part.

In this particular instance, the literal language says 30 days. That means if literally applied it would require a forfeiture of all sorts of rights involving millions of dollars to obtain any relief, either through administrative proceedings or through the courts.

Now we do not attribute forfeiture intentions to Congress unless the language is very, very clear. We look at the history of this legislation and we note that it came about after the original audit procedure, audit hearing board had been established with a set of regulations that advised 30 days, but permitted very much like many, many other statutes for extension of such time upon good cause shown in the interest of justice.

Congress said nothing in the statute about intending to overturn that prior administrative construction, and because it did, not we interpreted that statute to mean that Congress—fully aware of the interpretation of the predecessor—intended that procedure to go forward because we would not attribute to Congress an intention to impose a forfeiture unless Congress had said, expressed the intent, that that 30 days was jurisdictional.

If it is jurisdictional, even though it is a forfeiture, and that is what Congress intends, that is what would have happened.

We interpreted the law in that light.

Chairman PERKINS. Thank you very much, Mrs. Hufstedler.

We are delighted that you came this morning. We were certainly delighted to receive the benefit of your viewpoint on this question.

Secretary HUFSTEDLER. Thank you very much, Mr. Chairman.

Chairman PERKINS. All the other witnesses come around. We are facing a time limit here.

The remainder of the witnesses come up to the table, Prof. Eugene Gressman, Cornelius B. Kennedy of the firm of Kennedy & Webster, Washington, D.C. and summarize here in a couple of minutes whether you think the congressional veto of the regulations is constitutional or unconstitutional. You two gentlemen, summarize it in a couple of minutes.

STATEMENT OF PROF. EUGENE GRESSMAN, SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL AND CORNELIUS B. KENNEDY, ESQ., KENNEDY & WEBSTER, WASHINGTON, D.C.

Mr. GRESSMAN. Thank you.

Mr. GOODLING. I would like to ask unanimous consent that Secretary Scanlon's testimony be printed in the record. He has agreed since he has had a brief opportunity and you will have all of his material he then in turn will not testify.

Mr. FORD. Reserving the right to object, Mr. Chairman—and I shall not object—but I would ask the gentleman from Pennsylvania to check with his staff and find out how you voted on my amendment to put a 3-year statute of limitations in in 1978 when the legislation was before us.

I got slaughtered on that amendment. Former Congresswoman Patsy Mink put the 5 years in back around 1974.

Chairman PERKINS. I am very sure I voted for the 3-year statute.

Mr. FORD. Somehow I got tromped.

Chairman PERKINS. I don't know how you got tromped.

Mr. FORD. Maybe we will get another shot at it.

Mr. GOODLING. Apparently it was only that it wasn't explained properly or we didn't have enough time or something of that nature.

[The information referred to follows:]

PREPARED STATEMENT BY ROBERT G. SCANLON, SECRETARY OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA

CHAIRMAN PERKINS, DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE, I AM ROBERT SCANLON, SECRETARY OF EDUCATION IN THE COMMONWEALTH OF PENNSYLVANIA.

I AM HONORED TO BE ASKED TO TESTIFY BEFORE THIS SUBCOMMITTEE ON A SUBJECT I CONSIDER TO BE VERY IMPORTANT. I ESPECIALLY WANT TO THANK REPRESENTATIVE GOODLING FROM PENNSYLVANIA FOR MAKING THIS POSSIBLE.

I WANT TO KEEP THE FOCUS OF OUR TESTIMONY NARROW TODAY. WE APPRECIATE THE LARGER CONSTITUTIONAL ISSUES INVOLVED IN CONGRESSIONAL VETO OF AN AGENCY'S REGULATIONS, AND THE AGENCY'S DECISION TO GO AHEAD AND IMPLEMENT THE REGULATIONS. THE SEPARATION OF POWERS IS OF EXTREME IMPORTANCE. THE CONGRESSIONAL ACTION IN THIS CASE SUPPORTS AND STRENGTHENS THE SEPARATE POWERS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES, BUT WE KNOW THERE ARE CONSTITUTIONAL LAWYERS WHO ARE BETTER ABLE TO ADDRESS THOSE ISSUES.

OUR FOCUS HERE TODAY IS THREEFOLD: (1) TO COMMEND CONGRESS FOR TAKING THIS VETO ACTION, (2) TO SHOW HOW THE U.S. DEPARTMENT OF EDUCATION HAS, AND STILL IS, ABUSING ITS DISCRETION, AND (3) TO URGE CONGRESS TO FASHION ADDITIONAL RELIEF FOR THE STATES.

THE ACTION TAKEN BY CONGRESS IN EXERCISING ITS VETO POWER IN THIS INSTANCE IS A WISE AND FORESIGHTFUL ONE. THROUGH NO FAULT OF HER OWN, SECRETARY HUFSTEDLER INHERITED A SET OF REGULATIONS PERTAINING TO THE EDUCATION APPEAL BOARD AND THREE OTHER PROGRAMS WHICH EXCEEDED THE AUTHORITY

GRANTED TO HER AGENCY UNDER THE STATUTE. IN ADDITION, SECRETARY HUFSTEDLER INHERITED A SET OF PROCEDURES FOR THE ISSUANCE OF REGULATIONS AND FOR THE AUDIT OF TITLE I PROGRAMS.

I, TOO, COME TO THIS TABLE AN INHERITOR, AN HEIR. WHEN I BECAME PENNSYLVANIA SECRETARY OF EDUCATION IN JANUARY 1979, I INHERITED TWO AUDIT APPEALS OF TITLE I CASES IN PENNSYLVANIA DATING BACK TO THE EARLY 1970S. IT IS FOR THIS REASON THAT PENNSYLVANIA IS HERE TO TESTIFY ON THE EDUCATION APPEAL BOARD REGULATIONS AND GIVE ITS RECOMMENDATIONS AS TO A RESOLUTION OF THE DILEMMA CREATED BY AGENCY DISREGARD OF THE CONGRESSIONAL VETO.

AT THIS POINT, I WOULD LIKE TO DESCRIBE THE DILEMMA WE NOW FACE IN PENNSYLVANIA. WE HAVE BEEN OPERATING TITLE I PROGRAMS FOR 15 YEARS. WE HAVE ATTEMPTED TO BE SCRUPULOUS TO ENSURE THAT OUR PROGRAMS HAVE ABIDED BY THE TERMS OF THE STATUTE. THESE PROGRAMS HAVE BEEN EXTREMELY EFFECTIVE IN REACHING DISADVANTAGED CHILDREN. NEVERTHELESS, WE NOW HAVE TWO ESEA TITLE I AUDIT EXCEPTIONS WHICH ARE BEING HEARD BEFORE THE EDUCATION APPEAL BOARD.

PENNSYLVANIA BELIEVES IT HAD NO CHOICE BUT TO APPEAL THESE AUDIT EXCEPTIONS BECAUSE: 1) OF THE AMOUNT OF MONEY INVOLVED - OVER 35 MILLION DOLLARS; 2) THE AMOUNT WAS BEING DEMANDED AS A REFUND; 3) THE PENALTY WAS NOT AUTHORIZED BY THE STATUTE; AND 4) THE AUDIT EXCEPTIONS WERE BASED ON NON-COMPLIANCE WITH TECHNICALITIES EXPRESSED IN THE REGULATIONS, BUT NOT EXPRESSED IN THE STATUTE.

We now face a dilemma with respect to these appeals. Although the U.S. Education Department may be protected in its decision to go ahead and enforce the vetoed regulations based on Attorney General Civiletti's opinion, the states are not so protected. The Attorney General's opinion is not binding on Pennsylvania. All we have is a set of regulations rightly disapproved by Congress and we are faced with the agency's continuing attempt to enforce those regulations in total disregard of Congress's actions.

A second dilemma is the uncontrolled publication of regulations and the repressive enforcement of those regulations and its adverse effect on our Title I programs. Title I was conceived by Congress with high hopes for finding new educational techniques to reach and teach disadvantaged youngsters who were not succeeding in the traditional school program. Excessive regulation and severe enforcement penalties have restricted innovations and reduced the educational potentials. We believe that the program could be more effective if we were free to carry out the full array of program suggestions offered by Congress without fear of penalty. The severe penalities imposed through the regulations process have had a chilling effect on Pennsylvania and other states. The audit game and fear of penalty imposed by the agency has resulted in what may now be the most rigidly controlled educational program in the schools. Remedial reading and

REMEDIAL MATH IS ABOUT ALL WE OFFER TITLE I YOUNGSTERS IN PENNSYLVANIA NOW. THE RISK OF HAVING TO RETURN MILLIONS IN AUDIT EXCEPTIONS IS TOO GREAT FOR US TO EXPERIMENT OR TO TRY REFORMS DESIRED BY CONGRESS.

IN THE 15 YEARS SINCE TITLE I WAS BORN, THEN, A VICIOUS CYCLE HAS BEEN CREATED. IN 1965, CONGRESS ENUNCIATED A NOBLE PURPOSE FOR TITLE I: TO BUILD A VITAL PARTNERSHIP WITH THE STATES AND SCHOOL DISTRICTS AND TO FUND EDUCATIONAL PROGRAMS DESIGNED TO TAP THE EDUCATIONAL POTENTIAL OF THE DISADVANTAGED. FROM THIS COMMENDABLE IDEAL THE AGENCY HAS CREATED EXCESSIVE REGULATIONS LEADING TO CRUSHING AUDIT EXCEPTIONS. THESE, IN TURN, LEAD TO LITIGATION BETWEEN THE STATES AND THE FEDERAL GOVERNMENT. WE'RE FORCED TO ACT AS ADVERSARIES, NOT PARTNERS. THE AUDIT EXCEPTIONS AND SUBSEQUENT LITIGATION TEND TO PROMOTE FURTHER REGULATION EXERTING MORE FEDERAL CONTROL OVER THE LOCAL PROGRAM, BREEDING STILL MORE AUDIT EXCEPTIONS. THE RESULT IS A SWITCH OF FOCUS FROM THE NEEDS OF THE CHILD TO THE AVOIDANCE OF AUDIT EXCEPTIONS.

WE APPLAUD CONGRESS FOR ITS COURAGE IN EXERCISING ITS VETO POWER TO EXERT CONTROL OVER THIS VICIOUS CYCLE. IN THIS ONE SET OF REGULATIONS PERTAINING TO THE EDUCATION APPEAL BOARD, YOU HAVE ALREADY IDENTIFIED ONE INSTANCE IN WHICH THE REGULATIONS EXCEED THE CLEAR STATUTORY MANDATE. WE CAN NOW OFFER YOU EXAMPLES OF SIX OTHER SUCH INSTANCES WITHIN THE SAME SET OF REGULATIONS.

CONGRESS HAS ALREADY IDENTIFIED THE AGENCY'S PROVISION FOR DISCRETIONARY EXTENSION OF TIME FOR FILING AN APPLICATION FOR REVIEW. WE AGREE THAT THIS EXTENSION IS NOT AUTHORIZED BY STATUTE AND LENGTHENS FURTHER THE ALREADY EXTENSIVE AUDIT RESOLUTION PROCESS.

PENNSYLVANIA'S REVIEW OF THE STATUTE HAS DISCLOSED THE FOLLOWING ADDITIONAL DEPARTURES FROM STATUTORY AUTHORITY.

1. THE REGULATIONS HAVE LIMITED THE PARTY AGAINST WHOM RECOVERY MAY BE SOUGHT AND TO WHOM THE APPEAL PROCESS IS AVAILABLE BY RESTRICTING THE TERM "RECIPIENT," DEFINED IN THE STATUTE, TO THE "ORIGINAL RECIPIENT." UNDER THE STATUTE, ANY RECIPIENT OF FEDERAL FUNDS MAY BE HELD ACCOUNTABLE TO THE BOARD, AND ELIGIBLE TO BRING AN APPEAL. BY RESTRICTING THE DEFINITION TO THE ORIGINAL RECIPIENT ALONE, IN MOST CASES THE STATES WILL BE HELD ACCOUNTABLE, AND WILL BE REPRESENTED ON APPEAL, WITHOUT THE INCLUSION OF THE LOCAL EDUCATIONAL AGENCIES.

PENNSYLVANIA, LIKE MOST OF THE 34 STATES WHO HAVE HAD TITLE I AUDIT APPEALS, QUESTIONS WHETHER THE LANGUAGE CHANGE IN THE REGULATIONS WAS INTENDED BY CONGRESS. IN PENNSYLVANIA, FEDERAL AUDITORS FOUND IT WAS SIX SCHOOL DISTRICTS, AND NOT THE STATE, THAT ALLEGEDLY MISSPENT FUNDS. YET, THE AGENCY IS DEMANDING REPAYMENT FROM THE STATE ALONE. IF WE ARE REQUIRED TO REPAY THE AMOUNT IN DISPUTE, THE STATE'S ATTEMPT TO RECOVER MONEY FROM THE SCHOOL DISTRICT WILL BE DIFFICULT. THE REGULATIONS MAKE IT IMPOSSIBLE TO DETERMINE THE RELATIVE

LIABILITY OF THE STATE OR LOCAL EDUCATIONAL AGENCY. FURTHERMORE, THE PROVISION PRODUCES MULTITUDINOUS LITIGATION BETWEEN ENTITIES WHICH WOULD BE BETTER OFF COOPERATING.

2. THE REGULATIONS REQUIRE THAT THE STATES BEAR A HIGHER STANDARD OF PROOF IN THEIR APPEAL BEFORE THE EDUCATION APPEAL BOARD THAN IS REQUIRED BY STATUTE. THE STATUTE SAYS THAT IF THE AUDITORS' ALLEGATIONS OF WRONGDOING ARE SPECIFIC, THE APPELLANT HAS THE "BURDEN OF DEMONSTRATION" THAT THE EXPENDITURES WERE APPROPRIATE. IN CONTRAST, THE REGULATIONS REQUIRE THE APPELLANT TO CARRY THE "BURDEN OF PROOF" THAT EXPENDITURES WERE APPROPRIATE. THIS VARIATION COMPELS THE STATE TO PRESENT A JUSTIFICATION OF ITS ENTIRE TITLE I PROGRAM, PROVING THE CORRECT EXPENDITURE OF EVERY PENNY, BEFORE THE AGENCY MUST ADVANCE ITS ALLEGATIONS OF WRONGDOING. CERTAINLY CONGRESS RECOGNIZED THE DIFFERENCE IN THE STANDARD OF PROOF AND ONLY INTENDED FOR APPELLANTS TO MEET THE "BURDEN OF DEMONSTRATION."

3. THE AGENCY HAS TAKEN MORE THAN TWICE THE LENGTH OF TIME ALLOTTED BY STATUTE TO PROMULGATE REGULATIONS WHICH ARE STILL NOT COMPLETE WITHIN THEMSELVES. THE EDUCATION AMENDMENTS OF 1974 MANDATED THAT FINAL REGULATIONS BE PROMULGATED WITHIN 240 DAYS OF THE AUTHORIZING STATUTE. IN CONTRAST, THE EDUCATION APPEAL BOARD REGULATIONS WERE NOT PUBLISHED IN FINAL FORM UNTIL 518 DAYS AFTER THE AUTHORIZING STATUTE. BECAUSE THE REGULATIONS RESPECTING CLAIMS COLLECTION ARE STILL NOT PUBLISHED IN FINAL FORM, THE AGENCY CONTINUES TO REMAIN OUT OF COMPLIANCE WITH THE LAW.

It was Congress's intent that the appeal and recovery procedures for all of the ESEA programs be published in one document. The statute creates the Education Appeal Board and describes collection procedures to be followed by the agency. All of these provisions are contained in the same section of the statute. In contrast, the agency's regulations do not cover methods for the recovery of funds. The additional regulations covering this subject have not yet been finally published. The recipient must therefore consult multiple sources for regulations governing the appeal and recovery process in order to determine what to expect if an appeal should be taken.

It is ironic that the agency is now telling Congress that it cannot change the Education Appeal Board regulations vetoed by Congress because the states and school districts have relied on the interim final form of these regulations. There was reliance on invalid regulations because the agency insisted on this reliance and just now has been called to task by Congress. The states and school districts were powerless to take this action against the agency and we applaud Congress for interceding on our behalf.

4. WITHIN THE REGULATIONS UNDER CONSIDERATION, THE AGENCY FAILED TO REGULATE WITH REGARD TO THE STATUTORY PROVISION PERMITTING RETURN OF UP TO 75% OF RECOVERED FUNDS WHEN THERE HAS BEEN A CORRECTION OF THE PROGRAM. PENNSYLVANIA RECEIVED A LETTER FROM SECRETARY HUFSTEDLER FROM WHICH IT APPEARS THE AGENCY INTERPRETS THAT PROVISION IN THE LAW TO BE DISCRETIONARY AND PREDICATED ON A WAIVER OF A JUDICIAL APPEAL. IN OUR OPINION THERE IS A NOBLER PURPOSE IN THIS PROVISION. IT HAS POTENTIAL TO BE AN INCENTIVE FOR PROGRAM IMPROVEMENT RATHER THAN A MANIPULATION OF THE APPEAL PROCESS.

IN BOTH CIRCUMSTANCES IN WHICH PENNSYLVANIA FACES AUDIT EXCEPTIONS, THE PROGRAMS HAVE BEEN PROMPTLY CORRECTED TO CONFORM TO THE AUDITORS' INTERPRETATIONS OF THE REGULATIONS. THIS CORRECTION WAS MADE VOLUNTARILY, PRIOR TO THE RECEIPT OF ANY FORMAL AUDIT FINDINGS OR THE IMPOSITION OF ANY PENALTY. IN CIRCUMSTANCES SUCH AS THIS, WE FEEL THAT THE RETURN OF 75% OF OUR PENALITY IS WARRANTED WITHOUT ABANDONING OUR LEGAL REMEDIES. IT IS APPARENT TO US, IN PROVIDING FOR THE 75% RETURN, CONGRESS INTENDED NOT TO PENALIZE GRANTEES BUT TO INSURE COMPLIANCE WITH THE STATUTE.

5. THE AGENCY HAS FAILED TO UTILIZE REGULATIONS FOR OTHER STATUTORILY PRESCRIBED METHODS OF INSURING COMPLIANCE EXCEPT THE MOST ONEROUS PENALTY OF REPAYMENT OF EXPENDED FUNDS. THE AGENCY'S ALMOST EXCLUSIVE RELIANCE ON THE FISCAL PENALTY IS PROBABLY THE MOST SIGNIFICANT DISCREPANCY BETWEEN THE EDUCATION APPEAL BOARD REGULATIONS AND THE AUTHORIZING STATUTE. CONGRESS PROVIDED NUMEROUS MEANS TO INSURE COMPLIANCE

WITH THE LAW. AN EXAMPLE IS FASHIONING COMPLIANCE AGREEMENTS. NEVERTHELESS, THE AGENCY CONTINUES TO DEPEND ENTIRELY ON THE REPAYMENT OF EXPENDED FUNDS AS THE ONLY PENALTY FOR AUDIT EXCEPTIONS.

THE PENALTY OF REPAYMENT IS USED FOR THE MOST MINOR VIOLATIONS OF THE REGULATIONS AS WELL AS THE MOST EGREGIOUS AND WILLFUL MISUSE OF FUNDS. IN PENNSYLVANIA, ALL OF OUR TITLE I FUNDS HAVE ALWAYS BEEN USED EXCLUSIVELY FOR PROGRAMS FOR DISADVANTAGED CHILDREN. WE ARE FACED WITH SUBSTANTIAL AUDIT EXCEPTIONS, HOWEVER, NOT BECAUSE THERE WAS FRAUDULENT MISUSE OF FUNDS AND BAD FAITH, OR BECAUSE WE VIOLATED THE STATUTE IN ANY WAY, BUT ONLY BECAUSE THERE ARE ALLEGATIONS OF TECHNICAL DEVIATIONS FROM PROVISIONS OF THE REGULATIONS. IN ADDITION, THE FISCAL PENALTY IS MADE EVEN MORE BURDENSOME BY THE AGENCY'S DEMAND THAT REPAYMENT BE OF THE ENTIRE GRANT FOR THE WHOLE GRANT PERIOD AND THAT THIS REPAYMENT BE MADE ENTIRELY FROM STATE AND LOCAL FUNDS.

MOREOVER, THIS SEVEREST OF PENALTIES IS COUPLED WITH A RETROACTIVE APPLICATION OF THE LAW. PENNSYLVANIA WILLINGLY ACCEPTS THE FISCAL RESPONSIBILITY INHERENT IN ACCEPTING FUNDS FOR FEDERAL PROGRAMS AND IS HAPPY TO COOPERATE WITH THE FEDERAL GOVERNMENT IN ACHIEVING COMPLIANCE. NO GRANTEE, HOWEVER, CAN BE EXPECTED TO COMPLY WITH LAWS WHICH ARE NOT IN EFFECT AT THE TIME THE PROGRAM IS BEING OPERATED. NO GRANTEE SHOULD BE PENALIZED BY SANCTIONS WHICH ARE NOT IN EFFECT AT THE TIME THE ALLEGEDLY IMPROPER EXPENDITURE WAS MADE.

Perhaps the latest example of retroactive application is a court decision in California which resulted in a previously unrecognized definition of supplantation. The court's opinion was followed by the appearance of federal auditors in California who checked the books and found this form of supplantation had been occurring for the last five years. The State of California is now faced with a demand to return 28 million dollars on the basis of this audit exception.

The agency has further applied laws retroactively in its continuing demands for refunds of Title I funds that were expended prior to the amendments of 1978, which first wrote that penalty into law. The penalties provided for in the statute prior to 1978 have never been utilized. Thus, Pennsylvania is expected to refund its Title I grants for six school districts from the years 1971 through 1973, five years prior to the statute establishing a refund penalty.

6. The agency has designated the old, unauthorized Title I Audit Hearing Board as the new Education Appeal Board under the statute and retroactively impressed it with the authority it previously lacked. The Education Amendments of 1978 provide that if there is an existing departmental appeal board capable of carrying out the functions of the new law, it may be so designated. In 1978 when the statute was passed there were two audit appeal boards in the Department of Health, Education and Welfare. One was the Title I Audit

HEARING BOARD WHICH HAS BEEN ESTABLISHED WITHOUT STATUTORY AUTHORITY AND WITHOUT PROPERLY PROMULGATED REGULATIONS. THE OTHER WAS A DEPARTMENTWIDE BOARD CALLED THE HEW GRANT APPEAL BOARD.

THE COMMISSIONER OF EDUCATION DESIGNATED THE TITLE I AUDIT HEARING BOARD AS THE NEW EDUCATION APPEAL BOARD. THE ACTION OF THE COMMISSIONER APPEARED TO GIVE LEGITIMACY TO THE OLD BOARD, WHICH WAS FUNCTIONING WITHOUT STATUTORY AUTHORIZATION. FURTHERMORE, THE EDUCATION APPEAL BOARD ATTEMPTED TO LEGITIMATE THE AUDIT APPEALS PENDING BEFORE THE OLD TITLE I BOARD BY GRANTING ITSELF JURISDICTION OVER ALL OF THEM.

THIS SUBCOMMITTEE SHOULD TAKE A CLOSE LOOK AT THE AGENCY'S CHOICE IN DESIGNATING THE UNAUTHORIZED TITLE I BOARD OVER THE HEW GRANT APPEAL BOARD TO BE THE DEPARTMENTWIDE DISPUTE RESOLUTION MECHANISM. IT SHOULD ALSO EXAMINE THE AGENCY'S CHOICE IN PROMULGATING REGULATIONS WHICH FAIL TO CONFORM TO THE STATUTORY MANDATE INSTEAD OF UTILIZING THE ALREADY PUBLISHED REGULATIONS OF THE HEW GRANT APPEAL BOARD WHICH ARE, IN OUR OPINION, FREE OF THE INFIRMITIES PLAGUING THE REGULATIONS BEFORE US TODAY. IN CONTRAST, THE HEW GRANT APPEAL BOARD REGULATIONS ARE MODELS OF PROCEDURES WHICH WE WOULD BE HAPPY TO FOLLOW AND WHICH THE AGENCY SHOULD AT LEAST SERIOUSLY STUDY IN ATTEMPTING TO RECONCILE ITS CURRENT REGULATIONS TO THE STATUTE.

THE TWO PENNSYLVANIA CASES, AND AT LEAST 29 CASES FROM OTHER STATES THAT WE ARE AWARE OF, WERE INITIATED UNDER THE OLD BOARD AND SUBSEQUENTLY ADOPTED BY THE NEW BOARD. THESE CASES WERE BROUGHT BEFORE A BOARD WHICH WAS EQUALLY WITHOUT AUTHORITY AND JURISDICTION AND WERE SUBJECT TO A PENALTY FOR WHICH THERE WAS NO STATUTORY PROVISION. THE APPEALS PROCEEDED ACCORDING TO RULES WHICH WERE NEVER PUBLISHED IN ANY FORM. IN SUMMARY, PENNSYLVANIA IS BEING PENALIZED BY THE ACTION OF A TITLE I BOARD THAT LACKED JURISDICTION, WHICH WAS EMPANELED WITHOUT STATUTORY AUTHORITY, ACCORDING TO RULES WHICH WERE NEVER PUBLISHED, WITH A SANCTION WHICH WAS NOT ENACTED INTO LAW UNTIL MORE THAN FIVE YEARS AFTER THE PROGRAM WAS CONCLUDED.

WE APPLAUD CONGRESS'S COURAGEOUS STEP IN ACTING TO VETO THESE IMPROPER REGULATIONS AND TO HALT THE CYCLE OF OVER REGULATION AND AUDIT EXCEPTIONS. WE ALSO COMMEND CONGRESS FOR THE CLARITY OF THE AUTHORIZING LEGISLATION WHICH DOES NOT REQUIRE EXTENSIVE REGULATION TO IMPLEMENT. HAD THE AGENCY FOLLOWED THE GUIDANCE OF THIS LAW, WE WOULD NOT BE FACED WITH THE DILEMMA THAT HAS BROUGHT US HERE TODAY.

TO ASSIST US IN RESOLVING THIS DILEMMA, AND TO ASSIST OUR SISTER STATES, WE URGE CONGRESS TO ENACT A SPECIAL BILL OF RELIEF DISMISSING OUR CASES AND ALL OTHERS THAT WERE INITIATED BEFORE THE UNAUTHORIZED TITLE I AUDIT APPEAL BOARD, AND THAT ARISE FROM THE RETROACTIVE APPLICATION OF THE LAW. IN THESE CASES, THE AGENCY IS SEEKING REFUNDS FOR PROGRAMS WHICH HAVE BEEN CONCLUDED AS LONG AS 15 YEARS, AND IN PENNSYLVANIA'S CASE FROM 7 TO 10 YEARS.

BY THE DISMISSAL OF THE CASES, THE IDEAL OF A WORKING PARTNERSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE STATE MAY HAVE A BETTER CHANCE TO BECOME A REALITY. WE OFFER OUR ASSISTANCE IN WORKING TOWARD THIS GOAL AND MAKING THIS RELATIONSHIP POSSIBLE.

THANK YOU.

STATEMENT OF PROF. EUGENE GRESSMAN, SCHOOL OF LAW UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL

Mr. GRESSMAN. May I ask how long we have to summarize?

Chairman PERKINS. Identify yourself for the record.

Mr. GRESSMAN. My name is Eugene Gressman, professor of constitutional law at North Carolina Law School.

My colleague, Mr. Cornelius Kennedy, is a lawyer here in Washington, D.C.

Both of us have been involved in all the litigation that has taken place to date in the courts with respect to the so-called one-house veto and its constitutional implications.

We were involved in those cases precisely because the Department of Justice refused to represent the Congress when attacks were made upon the constitutional validity of this technique. I had the honor of serving as special counsel to the House of Representatives; therefore, as Mr. Kennedy served a counterpart, special counsel, to the Senate.

In the briefest possible summary that I can make of it, I would say that the position of the Attorney General in his statement to the Secretary of Education misstates the constitutional issue and misstates and confuses the issue itself and the effect upon this proposition.

We have seen all of these arguments put forth by the Attorney General in this letter, put forth to the courts in a series of four or five cases in which we have been involved.

These statements and constitutional analysis made by the Attorney General at this point are really boilerplate arguments that he has been making for the past several years in litigation and it has yet to impress any court.

Indeed, we have a definitive judicial decision of monumental importance made by the Court of Claims in the *Atkins* case, which I believe persuasively disposes of every constitutional argument that the Attorney General is still putting forth.

The Department of Justice saw fit not to take that case to the Supreme Court. They opposed the petition for certiorari that the judges filed in that case which would have raised—which did raise directly the constitutionality of the so-called one-house veto.

The Justice Department, for reasons best known to itself, did not accede to that request for review by the Supreme Court and opposed the petition on rather technical grounds.

The Supreme Court thereupon denied certiorari.

I submit, as I have to other committees of the Congress, that the *Atkins* v. *United States* opinion by the Court of Claims should be required reading for anybody who suggests or questions the constitutionality of the so-called one-house veto.

It literally responds to every sentence, every claim that the Justice Department has made over many years that this technique of legislative disapproval is somehow unconstitutional.

I think it will be a very persuasive opinion in the future and is going to have a precedent, is going to greatly influence any other cases that may come up.

With respect to the merits of the constitutionality argument, I must start with a proposition that I think the Attorney General and most of us are suffering under a tyranny of words. We do not deal in this case, as we have not yet dealt with any of the cases in the courts, with a true legislative veto. I think the word "veto" is a misnomer in the situations that we have dealt with and are dealing with here today.

I would prefer the word which is used in the committee's invitation to attend this hearing to consider the legislative disapproval provision in this particular statute, and I say that that is a critical misuse of the word "veto" because it assumes that you are vetoing something that is already part of law; that the regulation that you are reviewing and disapproving has already been finally effective and made a part of administrative or statutory law as it may be.

That is not what is happening here. All that is happening here is—and you read this statute on its face and with its purpose in mind—and all that you have delegated to the Department of Education is a limited function of proposing regulations.

Section 431(b), I think it is, actually uses the words "proposed regulations" that are to be formulated in the first instance by the Department of Education, and then they are sent to the Congress to lay over for 45 days during which, by concurrent resolution, the Congress can disapprove a proposed regulation.

It doesn't veto anything that is in effect. The status quo has not been established by the proposed regulation. It is a proposal and nothing more or less.

Congress has the inherent power to disapprove or reject a proposal made to it by a department, an agency, or any other Member of Congress, as he simply has his proposals reflected by one House or two Houses many times.

In a nutshell, there is no constitutional problem; there is no constitutional directive that tells this Congress how you shall treat a given proposal before the Congress, be it in the form of a proposed regulation or a proposed bill by a Congressman.

That is the sum and substance of the constitutional problem. There is none, and that is exactly the conclusion that the Court of Claims reached in the *Atkins* case. That is why they reject all these arguments put forth by the Department of Justice, because the Department of Justice proceeds as the court says. On the fatal and faulty assumption that what is being put forth by the Agency or the Executive in the so-called one-House, two-House veto situation is nothing more than a proposal that has not yet achieved the status of law, and there is nothing in the presentment clause in the Constitution; there is nothing in the separation of powers doctrine that is impeded or infringed when you exercise your historical techniques of disapproval of some given proposition. That is my strong feeling, and I would not have been—I was not surprised to see these arguments repeated in the Attorney General's letter.

What is truly shocking to me, however, is that he has used those—and I almost am prepared to use the word "frivolous"—constitutional contentions as a basis for imposing a serious confrontation with the Congress by directing the Secretary of Education, in effect, to disregard not a veto, but the refusal by this Congress to allow the Department of Education regulations to become finally effective and become part of the law at that point.

Chairman **Perkins**. Would you agree, Mr. Kennedy?

STATEMENT OF CORNELIUS B. KENNEDY, ESQ., KENNEDY & WEBSTER, WASHINGTON, D.C.

Mr. KENNEDY. Mr. Chairman, members of the committee, I do agree with the basic premises that Professor Gressman has articulated. I have approached this question of a legislative veto, both while I was chairman of the section on administrative law of the American Bar Association, and also in my activities as a public member of the Administrative Conference of the United States, in addition to participating in the legislative veto cases.

I feel, as a result of my research, that the legislative veto provision, as I said in my prepared statement, properly prepared, properly done, is totally constitutional.

I would address one point that Professor Gressman did not which goes, I believe, to the type of arguments made by the Department of Justice, both in our cases and before this committee and elsewhere. They keep raising the issue of bicameralism; that a one-House veto would violate that principle.

Clearly if, as the Attorney General has said, a rule or regulation has the force of law, either House of Congress ought to be able to prevent that regulation from having the force of law given the proper statutory provision procedure for making such a congressional decision.

Whether it is a one-House veto or a two-House veto, as the terminology is, doesn't bother me one bit. Either House of Congress should be able to prevent the law from being changed if that is what the regulation would have the effect of doing, or supplementing it in some particular way.

I also believe that the fatal defects in the Department of Justice argument each time that they have made it that I am aware of is that they believe there are some inherent types of powers in the executive branch.

They make the statement in the Attorney General's letter, for example, that Congress was empowered to constrain any executive action not committed by the Constitution exclusively to the executive by passing legislation on that subject.

I say really the opposite is the case.

The executive branch takes no action except as authorized by Congress. It is not a question of constraining executive action, but of taking any action at all.

Indeed, in an article I prepared entitled "Time To Re-examine the Legislative Function of Congress," for the American Bar Association Journal, I make the observation that if we ever have an imperial President, he will be created by Congress and not by the Constitution because all of the executive functions with three minor exceptions are created by Congress. Those three exceptions are being military commander in chief, granting pardons and reprieves, and receiving ambassadors.

All other executive action must be approved by Congress or created by Congress.

I feel that throughout the Department of Justice position it is taking the position that something is being taken away from the President by the legislative veto. That is not true at all.

As a matter of fact, you may note in my prepared statement I make the comment that the President's veto power over legislation has been properly placed in article I dealing with the Congress' power not in article II dealing with the executive power, because really all that says is that in certain instances the Congress must pass legislation by a two-thirds vote.

It is a qualification of the power of Congress, a determination of the size of the plurality, if you call it that, that Congress must take in its action not a right of the President. It says if the President disagrees, then Congress must pass it by a greater margin.

So I don't regard even that as a Presidential power, an executive power, but merely a right to create a set of circumstances requiring a greater congressional vote.

I would touch also on the issues—Professor Gressman did not mention in his brief summary—of this argument they make that Congress cannot interpret the law.

Well, obviously the executive branch interprets the law when it enforces or executes congressional action. Congress interprets the law when it decides whether to amend or to pass new legislation. The judicial branch interprets the law, yes, in deciding cases or controversies, but from the very beginning of our country the judicial branch has said in response to a Presidential request for advisory opinions on legal matters, that it could not extend that advice unless it was in the context of a case or controversy.

So the judicial branch's authority to—constitutional authority to interpret law is very narrow indeed and goes to its judicial function, just as the Congress interprets law in carrying out legislative functions and the executive branch interprets law in carrying out the executive functions.

I cannot agree in a basic sense then with this thought that there is some broad executive power which the legislative veto provisions inveigh. That is simply not so. It is a case of Congress constructing an authority under which the executive branch must operate, an authority which includes a requirement that the executive branch proposes changes or supplementation that they wish to make in a statute to the Congress and one or both Houses of Congress can, by affirmative or negative resolutions, reject that.

I thank the committee for the opportunity to present these views.

I might say one other thing, precisely on these regulations; the members of the committee have commented that the legislative veto provision was a bipartisan approach. When this committee was considering that amendment proposed in committee, the sponsor of the amendment made the very point that I make now, that there is no lawmaking power anywhere in the Government except in Congress and that, in effect, the executive branch, he said, was trying to make law just as much as we are, and I want to put a stop to that.

That amendment that was proposed by Congressman O'Hara at that time was adopted by the committee by a vote of 28 to nothing. I think that speaks very clearly as to the congressional intent here that the power of the Department to make rules and regulations was subordinate to the power of Congress—either House, or both Houses—to disapprove those regulations.

[The prepared statements of Eugene Gressman and Cornelius B. Kennedy follow:]

Prepared Statement of Prof. Eugene Gressman, School of Law, University of North Carolina, Chapel Hill

This statement respectfully dissents from the position of Attorney General Civiletti, expressed in his letter of June 5, 1980, to the Secretary of Education, that Section 431 of the General Education Provisions Act, 20 U.S.C. §1232(d),

> ". . . is unconstitutional and that you [the Secretary of Education] are entitled to implement the regulations in question in spite of Congress' disapproval."

The Attorney General's position in untenable for the following reasons, which are elaborated hereinafter:

(1) The statutory scheme of Section 431 does not constitute, as the Attorney General would have it, a true legislative or two-House "veto" provision. It is nothing more than a limited delegation to the Department of Education of the power to formulate and propose "final regulations,"

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which become finally effective only when Congress reviews and does not disapprove such proposed regulations. Thus the Attorney General's constitutional objections to a two-House "veto" device are totally inapplicable with respect to Section 431.

(2) The constitutionality of the legislative review procedures of Section 431 is clear. The constitutional footing of the General Education Provisions Act is the Article I power of Congress to provide for the "general Welfare of the United States." Art. I, Sec. 8, cl. 1. And to help in the execution of that general welfare power, Congress can draw upon its vast discretionary authority resident in the Necessary and Proper Clause to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, Sec. 8, cl. 18. Section 431 constitutes just such a "necessary and proper" provision. By virtue of inserting Section 431 into the General Education Provisions Act, Congress has deemed it necessary and proper, in aid of its general welfare powers over education, to utilize concurrent resolution procedures to determine if and when certain proposed regulations under the Act shall become part of the law of the land.

(3) The constitutionality of the type of legislative review procedures embodied in Section 431 has been fully considered and sustained in Atkins v. United States, 556 F.2d 1028, 1057-1071 (Ct.Cl. 1977), cert. denied, 434 U.S. 1009 (1978); Pressler v. Simon, 428 F.Supp. 302 (D.D.C., 3-judge court, 1976), affirmed sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978).

(4) Indeed, just one year ago, in testimony before another committee of the House, Attorney General Civiletti acknowledged that

the type of legislative review procedures embodied in Section 431 is quite consistent with the Constitution. In his words, Congress can constitutionally "retain the power within a statute to in effect promulgate the rules and regulations itself."[1] That is precisely the kind of power retained by Congress in Section 431.

A. The absence of any "veto" in Section 431

The Attorney General has mounted a major constitutional attack on Section 431, primarily in terms of the separation of powers doctrine. But these constitutional arguments, aside from being quite questionable on their merits, are entirely misdirected. Their thrust is toward a congressional effort to veto or void an agency or departmental regulation that has achieved final effectiveness, and thereby become a part of the fabric of existing law, prior to any congressional review or consideration.

Section 431, however, incorporates a procedure that in no way envisages a congressional "veto" of any part of existing law, established by some prior regulation made effective on promulgation by the Department of Education. As will be seen from the statutory analysis below, Section 431 carefully refrains from delegating authority to the Department to promulgate final and binding regulations having the force of law. The Department is authorized only to propose and transmit suggested regulations to Congress, which reserves the unquestioned power to consider, approve or reject the proposed regulations. Under Section 431, congressional rejection takes the form of a concurrent resolution of disapproval.

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[1] Hearings before the Subcommittee on Rules of the House of the Committee on Rules on H.R. 1776, 96th Cong., 1st Sess., Part 1, p. 437 (Sept. 26, 1979). The full context of the Attorney General's above-quoted remarks appears subsequently in this statement.

The basic error in the Attorney General's treatment of Section 431 is the assumption that a concurrent resolution disapproving a proposed regulation is the equivalent of a two-House veto of a legally existent regulation. That assumption is wrong. It is a fairly common trap for those who write and think about the problems of congressional oversight and review of administrative regulations. Without bothering to dissect the statutory procedure in question, far too many people use the stock term "one-House veto" or "two-House veto" to refer indiscriminately to all forms of oversight and review by Congress. And when it comes to arguing the constitutional implications of any form of congressional review and rejection of administrative regulations, the proponents of unconstitutionality concentrate their attack far too often on a "veto" provision that is not really incorporated in the statute in question.

The Attorney General's letter of June 5, 1980, is a perfect example of this rather widespread tendency to ignore careful analysis of a statutory scheme of congressional review and to seize upon the last step in that scheme as another evil "veto" provision. The statutory analysis in that letter begins and ends on page 2, consisting solely of a quotation of the concurrent resolution language in Section 431(d)(1). Not a word is said about the provisions of the preceding subdivisions of Section 431, which serve to explain the status of the regulations when they are transmitted to Congress for possible disapproval by concurrent resolution. Not a word is said about the fact that Section 431(d)(1) carefully avoids the use of the word "veto" and speaks only of disapproving proposed final regulations. The Attorney General simply uses the statutory reference to disapproval by concurrent resolution as a code phrase for a "two-House veto." He then launches into a constitutional assault on the stereotype "veto" device, ignoring once again the elemental principle that constitutional analysis presupposes the most careful of statutory analyses.

It accordingly becomes appropriate to supply the statutory analysis that the Attorney General's letter of June 5 so studiously omits. Fairly read, Section 431 establishes the following scheme of formulating and finalizing rules and regulations under the General Education Provisions Act:

(1) Rules and regulations "of general applicability" are to be formulated and issued by the Department of Education, each provision of which must cite "the particular section or sections of statutory law or other legal authority upon which such provision is based." Section 431 (a)(1) and (2).

(2) Section 431(b)(1) refers to any regulation issued under Section 431(a)(1) and (2) as a "proposed regulation." It then provides that no such "proposed regulation . . . may take effect until thirty days after it is published in the Federal Register." It is important to note that this provision does not purport to decree that any such "proposed" regulation "shall" become effective on the expiration of the 30-day period. The 30-day period is simply one in which interested parties may comment on, or take exception to, the proposals; that period for public comment can be waived, however, if specified congressional committees do not disapprove. Section 431(b)(2)(A) and (B).

(3) It bears emphasis that the 30-day period for comment is not designed to establish the 30th day as the one on which the "proposed

regulation" becomes final or effective. Section 431(b)(2)(A) specifies that when a comment is made or an exception taken to a proposed regulation during the 30-day period following publication, the Commissioner "shall reconsider" any such regulation. Obviously, the 30-day period is extended whenever a comment or exception is made, though no provision is made as to when the extended period is terminated. This creates something of a time gap whenever the Commissioner reconsiders a regulation. But it seems clear that nothing in Section 431(b) establishes an effective date for any proposed regulation, whether or not it is reconsidered by the Commissioner.

(4) Provision for giving final effectiveness to the proposed regulation of the Department is found in Section 431(d)(1). Concurrently with the publication in the Federal Register (which also starts the 30-day comment period), any proposed regulation -- referred to here as "any final regulation"[2] -- "shall be transmitted" to the Congress. Such "proposed" or "final" regulation "shall become effective" not less than 45 days after such transmission "unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation."

The bottom line of Section 431 is a clear line, a bright line. When a regulation is transmitted to Congress by the Department, it comes in the form of a proposal. The Department has not been delegated authority

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2. In legislative review provisions of this type, Congress often employs the word "final" to describe the "final" proposals of the agency or department that are being transmitted to Congress for review. In this context, the word "final" in "final regulation" is used as an adjective to describe the final-draft status of the proposed regulation. The word "final" is not used here used to define the point in time when a proposed regulation becomes effective as a matter of law.

to give finality to any of its proposed regulations. The Department can only propose or suggest. Finality occurs only after the lapse of 45 days following transmission; it occurs silently, by way of a failure to adopt a concurrent resolution of disapproval. And thus when Congress does disapprove by concurrent resolution, it does not disapprove or veto a previously finalized regulation. It simply declines to adopt or approve a suggested regulation. Such a declination, of course, in no way alters the status quo and assumes none of the characteristics of legislation.

In short, Section 431 does not employ a true "two-House veto" device. In the Attorney General's words of a year ago, Congress has here retained its power "to in effect promulgate the rules and regulations itself."

B. The constitutionality of Section 431

Once the legislative review procedures of Section 431 are fully and fairly read, their constitutional validity is apparent.

The constitutional problem is to discover and define the power of Congress to adopt by inaction, or to disapprove by concurrent resolution, regulations proposed by the Department of Education in implementation of the General Education Provisions Act. That problem is answerable by resort to the Necessary and Proper Clause of the Constitution, Art. I, Sec. 8, cl. 18, particularly as explicated by Chief Justice John Marshall in McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 421 (1819). By use of that constitutional clause, the Court of Claims was able to validate the legislative review procedures of the Salary Act, procedures that are conceptually identical with those in Section 431. Atkins v. United States, 556 F.2d 1028, 1057-1071 (Ct.Cl. 1977).

The essential point of the famous McCulloch decision is that the Necessary and Proper Clause is an affirmative grant of discretion to the Congress to select the means it considers appropriate to carry into effect and execute all powers vested by the Constitution in the Congress, or in any other branch or department of the Government. Once such a vested power has been identified, the Necessary and Proper Clause authorizes Congress to choose whatever means it thinks is necessary and proper in order to execute that vested function. The choice, of course, must be consistent with both the letter and the spirit of all other provisions of the Constitution.

Thus the starting point of the McCulloch methodology is to identify the power vested in Congress that is being executed or implemented in a particular instance. Here the power in question involves congressional aid and assistance to the nation's public educational system, a power that is lodged in the broad provision of Art. I, Sec. 8, cl. 1, vesting in Congress the authority to provide for the general welfare of the United States. That vested power clearly enables Congress to enact the various substantive provisions of the General Education Provisions Act, as well as to adopt or approve detailed regulations thereunder.

The next step in the "necessary and proper" approach to constitutional analysis is to identify the means selected by Congress to aid in the execution of this vested power with reference to public education. Such means are often integrated into the statutory scheme that constitutes the exercise of the vested power. That is the case with respect to the General Educations Provisions Act. Section 431, as an integral part of that Act, embodies one of the means selected by Congress to help execute this expression of Congress' vested power to provide for the general welfare. As seen above, Section 431 delegates to the Department of Education the limited and initial function of formulating and publicizing proposals for detailed regulations under the Act. The section then prescribes a procedure whereby Congress can check, monitor, approve or disapprove the Department's proposals. In thus retaining its unquestioned power to promulgate statutory regulations, Congress has provided in Section 431 an internal mechanism or means for executing that retained power.

The final step in the "necessary and proper" methodology is to be certain that the means selected by Congress be "not prohibited, but consistent with the letter and spirit of the Constitution." McCulloch v. Maryland, supra. Without indulging in extended analysis, suffice it to say, as the Court of Claims said in Atkins, that there is no other provision in the Constitution that purports to restrict or outline the internal mechanisms by which Congress either approves or disapproves proposed regulations under a valid statute. A concurrent resolution that disapproves departmental proposals and thereby declines to alter the status quo is certainly not an act that constitutionally requires the concurrence of both Houses, within the meaning of the Presentment Clause in Article I, Section 7, clause 3, and a presentment to the President for approval or disapproval. Nor does the separation of powers doctrine assign to the Executive rather than the Legislature an exclusive power to promulgate statutory regulations. The Exeutive can implement and supplement a statute only to the extent that Congress so delegates that function.

In sum, once a valid statute has been enacted, Congress can can provide whatever means it deems necessary and proper to oversee the development and promulgation of implementing regulations. There is no letter or spirit within the Constitution that prohibits Congress from using its historic concurrent resolution device to refuse to permit certain proposed regulations to become effective. Certainly the Executive has no vested power to issue or finalize such proposals save as Congress may permit.

The Executive's role in this instance is to propose regulations and to transmit them to Congress for consideration. The techniques that Congress may use to approve or disapprove such proposals do not concern or even implicate the constitutional functions of the President.

Section 431 is totally constitutional.

C. The precedents relative to validity of Section 431

There are two judicial decisions that have confronted the constitutional problems that the Attorney General feels are implicit in the kind of legislative review procedures embodied in Section 431. Both decisions have soundly rejected the Attorney General's position, and have sustained the constitutional validity of such procedures. Atkins v. United States, 556 F.2d 1028, 1057-1071 (Ct.Cl. 1977), cert. denied, 434 U.S. 1009 (1978); Pressler v. Simon, 428 F.Supp. 302 (D.D.C., 3-judge court, 1976), affirmed sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978).[3/]

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[3] Essentially the same constitutional questions have been aired before the Ninth Circuit in Chadha v. Immigration and Naturalization Service, C.A. 9, No. 77-1702. At issue there is the validity of a very similar legislative review device embodied in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2). The case has been pending for decision since May of 1978.

Both decisions involved the constitutionality of the then provision in the Salary Act, 2 U.S.C. §359(1)(B), whereby either House of Congress, by its own simple resolution, could "disapprove" all or a part of the President's recommendations as to judicial salary increases or scales. What makes these decisions so pertinent to the Section 431 problem is the fact that the critics of the legislative disapproval device have never made any distinction between a one-House resolution of disapproval (as in the Salary Act) and the two-House concurrent resolution of disapproval (as in Section 431). And there is no meaningful distinction for purposes of constitutional assessment of such disapproval action by Congress.

The opinion of the Court of Claims in Atkins is a veritable tour-de-force. It is the most complete and the most convincing demonstration yet made of the affirmative powers of Congress, under the Necessary and Proper Clause, to oversee, to review and ultimately to disapprove or approve administrative rules and regulations before they become effective. So persuasive was the court's rejection of the Attorney General's constitutional objections that, in subsequent briefs and memoranda, the Attorney General has relegated citation of the decision to footnotes. See, e.g., footnote 9 of his letter of June 5, 1980, to the Secretary of Education. The technique is simply to cite and then ignore the Atkins opinion, and to repeat all the constitutional objections that were fully assessed and rejected in the opinion.

That is why it is unnecessary here to explore or attempt to answer the constitutional contentions raised by the Attorney General in his letter of June 5, 1980. Those contentions are fully refuted in the Atkins opinion, which should be required reading for all who are concerned with the constitutional implications of the congressional review and disapproval device with respect to administrative regulations.

Only one caveat is in order for those who would read the Atkins opinion. The Court of Claims consistently used the hackneyed phrase "one-House veto" throughout its opinion, despite the fact that it was not dealing with any kind of a legislative "veto" of Executive action that had achieved finality as a matter of law. It was dealing solely with the device of a one-House resolution of disapproval of Presidential salary recommendations, which is conceptually identical with the Section 431 device of a two-House concurrent resolution of disapproval of proposed administrative regulations.

With that caveat in mind, it is enough to reject the Attorney General's constitutional contentions in his June 5 letter by quoting the concluding paragraph of the powerful Atkins opinion, 556 F.2d at 1070-1071:

> "We end this part III of the opinion by reiterating that the one-House veto present in the Salary Act is a device authorized by article 1, section 1, coupled with the necessary and proper clause, and that it contravenes neither the broad principle of the separation of powers nor any specific provision of the Constitution. In particular we note that the necessary and proper clause, which has sanctioned the massive delegation of legislative functions over the past century, provides a firm grounding for this legislative veto. Congress plainly felt the need for this veto device, instead of relying solely on the power to override presidential recommendations by a full-fledged statute. In McCulloch's phrases, Congress exercised 'its best judgment' in the selection of this measure and sought to 'accommodate its legislation to circumstances.' In the world of reality the mechanism, as we have underscored, was a fair substitute for full bicameral concurrence, did not invade the Executive's own sphere, and took due account of the limited presidential participation. It was a permissible accommodation of competing interests, reflecting

> both an appropriate check by Congress upon the Executive and some check by the Executive upon the action which could be taken by one House alone. To borrow the Supreme Court's language, some 50 years ago, in upholding congressional delegation, this particular one-House veto seems to us to pass the test of 'common sense and the inherent necessities of the governmental coordination.' Hampton & Co. v. United States, 276 U.S. at 406."

It is appropriate to close this statement with some testimony that Attorney General Civiletti gave before a Subcommittee of the House Committee on Rules last September 26, 1979 (see footnote 1, supra). The colloquy that there occurred between Congressman Frost and the Attorney General constitutes Mr. Civiletti's own answers to the constitutional contentions he raises in his letter of June 5, 1980.

> Mr. Frost. If you would, I think that may well be helpful to the committee, to some of us on the committee who would like to explore that question. I do not know if you have had the opportunity to see a statement by one of the witnesses we are going to have later on, Eugene Gressman. I do not know if you are familiar with his testimony.
>
> Mr. Civiletti. No; but I am familiar with his point of view because he represented the other side in the *Chadha* case and wrote and argued that case before the circuit court there. Though I have not seen the statement, I can anticipate what he will say.
>
> Mr. Frost. Let me briefly quote from his statement that we will be hearing later on, in addressing the *Atkins* case and the implications that that has on the one-House veto; his position is that a one-House veto could be structured so as to be constitutional if it had the following characteristics: That the administrative agency should not be delegated authority to promulgate final and binding regulations having the force of law; the agency should be authorized only to propose or to make effective regulations and that Congress should reserve unto itself the unquestioned authority to approve or disapprove any such recommended or proposed regulations, and then only if Congress approves or either House does not disapprove, would the proposed regulations be deemed final and thus promulgated.
>
> Mr. Civiletti. That is more in the flavor of study-and-report or report-and-wait kinds of provisions. To the extent that a device of that kind or a structure of that kind were tailored which was not mandatory in controlling the authority already delegated to the Executive under existing law, then it seems to me that Congress could retain the power within a statute to in effect promulgate the rules and regulations itself.
>
> There are manners and methods in which I believe you can do that constitutionally, but I do not think you can do it both ways. I do not think Congress can delegate and authorize the executive branch and a regulatory body to faithfully carry out the law, and then reserve the right to reject or pass on individual actions of such delegation. It clearly can retain the regulatory control in the first instance by not delegating the authority to the regulatory body other than as provided by law. It can certainly require, in any number of ways, studies and reports back and ancillary implementing legislation. So from what you have said, I think that that may be close to a permissible way in which to handle such matters. But in my judgment it goes slightly over the line in terms of having it both ways by both delegating and reserving the power to disappr

PREPARED STATEMENT OF CORNELIUS B. KENNEDY, ESQ., KENNEDY & WEBSTER, WASHINGTON, D.C.

My name is Cornelius B. Kennedy. I am a lawyer practicing in the District of Columbia. I have served as a member of the Council for the Section on Administrative Law of the American Bar Association and subsequently as chairman of that section. I am presently serving my fifth term as one of the public members of the Administrative Conference of the United States, an organization created by statute, and for most of that period I have served as chairman of its Committee on Rulemaking and Public Information. Within the jurisdiction of that committee are both matters pertaining to agency rulemaking and to freedom of information and privacy issues as they concern the federal agencies and the public. I am also a member of the American Law Institute and a Fellow of the American Bar Foundation. My legal education was at the Harvard Law School.

Together with Professor Gressman, I have participated in the principal cases concerning the constitutionality of what has been called the legislative veto. In connection with those cases I have had the opportunity to research the constitutional issues involved in the legislative veto question and I am convinced that legislative veto provisions, properly constructed, are fully constitutional. Arguments previously made to this committee and elsewhere by members of the Department of Justice on behalf of the President are either without sound foundation, are premised on inadequate factual analysis or are based on subjective determinations as to the desirability of such a legislative technique rather than its constitutionality. In this latter category, I place arguments such as the increased workload which such a technique would place on Congress and its committees and the opportunity which the technique provides to the public to present its objections to agency action both to the executive branch and, if unsuccessful there, to the legislative branch. Such arguments are clearly matters to be considered by Congress in deciding whether to utilize the legislative veto technique in a statute in a specific context, but they do not go to the issue of constitutionality.

Thus, for example, Congress has always retained the right to make the specific determinations with respect to federal pay scales and to the deportation of aliens, on an individual basis, who are in this country contrary to law. In the case of alien deportation, the executive branch has sought since the days when Frances Perkins was Secretary of Labor to have Congress grant to the executive branch the final decision as to whether to deport aliens illegally in this country and Congress has consistently refused to grant that authority. Instead, Congress has provided that when deportation proceedings against an alien are mandated by statute, the executive branch may propose to suspend the deportation proceedings against the alien but that Congress may, through what is called the legislative veto technique, reject or veto such a proposal. This is not interference by the legislative branch in matters committed to execution by the executive branch because Congress retained the power to reject the recommendations which are made, under the present statute by the Attorney General, to suspend such deportation proceedings.

In the case of the federal pay levels, the executive pay statutes which were at issue in litigation in the Atkins and Pressler cases provided that if the Congress disagreed with the recommendations of the President for changes in the applicable rates of pay, it could "veto" those recommendations. In that case the existing rates of pay previously approved by Congress would remain in effect. In the Atkins case, such a statutory provision was upheld by a majority of the Court of Claims and certiori was denied by the Supreme Court. In the Pressler case, brought by then congressman Pressler with respect to legislative pay levels covered by the same legislative review provision, the Supreme Court affirmed a three-judge court decision that such a legislative veto statutory provision was within the powers of Congress under the necessary and proper clause authority set out in the Constitution.

The question which this committee is considering is how these precedents apply to statutory provisions permitting legislative rejection of agency rules by prohibiting such rules from becoming effective if they are disapproved by, in this case, a resolution adopted by both Houses of Congress. The arguments made by the Department of Justice that such a provision is unconstitutional are the same arguments which they have already made with respect to the similar provisions in the Federal Pay Acts and the Immigration Act.

They begin with the so-called separation of powers argument, which I expressly term "so-called" because while the Constitution has a clear separation of functions as part of its design, the separation of powers argument is improperly applied in the position taken by the Department of Justice. This is because it is premised on a fatal misconception of the Constitution. For example, the Department of Justice has argued that under the Constitution "Congress was empowered to constrain any executive action not committed by the Constitution exclusively to the Executive by passing legislation on that subject." Really, the opposite is the case because apart from his constitutional powers as commander in chief, and his power to grant pardons and reprieves and receive ambassadors, the President has nothing to execute unless legislation on that subject is passed by Congress.

It is the Congress which established the departments and the agencies and gave them their functions to be executed by the President and the other members of the executive branch. Perhaps, I should mention as a footnote that even though the President is given the express constitutional power of commander in chief of the military forces, the Constitution expressly provides that it is Congress which declares war, makes rules concerning captures on land and water, and, I emphasize, makes rules for the government and regulation of the land and naval forces. Thus, all military matters except the military direction of the armed forces is expressly committed to the Congress under our Constitution which was established by the people to expressly vest in their elected representatives all of the legislative powers which the people vested in the federal government. It should not be forgotten that our forefathers who fought a war for freedom from the tyranny of a monarch were not about to place the power over their life, liberty and pursuit of happiness in the executive branch, but rather to repose it in the branch composed of their elected representatives.

Much has been made by the Department of Justice of the fact that the statutory legislative veto provisions deny to the President the opportunity to exercise his veto power provided under the presentation clauses of the Constitution found in Article I, Section 7 of the Constitution. But *that* is no executive branch power. It was properly placed in Article I of the Constitution dealing with the legislative branch procedures rather than in Article II dealing with the executive branch because it merely says, when the President disagrees with a bill or resolution passed by both Houses of Congress which must be presented to the President under the Article I procedures, that for such a bill or resolution to become law it requires a two-thirds vote of both Houses. The Constitution could as well have provided that all legislation would require a two-thirds vote of both Houses to be considered adopted, but in the interest of a pragmatic solution to the problem of adopting legislation in a body representing widely differing interests, it imposed the two-thirds requirement *only* when the President indicated his disagreement with the legislation by exercising the right to require the legislation to be "repassed" by two-thirds of each House.

It should be pointed out, however, that the Constitution does impose specific limits on the actions which can be properly taken by Congress. For example, it cannot pass a bill of attainder or ex post facto law. It is limited in its taxing authority and, if it creates an office in the executive branch, it does not have the authority to appoint to that office but only the right for the Senate to advise and consent to such a nomination prior to the appointment, where it chooses to reserve that right.

With this foundation, let me turn to the regulations of the Department of Education which are of concern here. The Attorney General has said in his letter to the Secretary of Education that "without a legislative veto, the regulations of your Department, unless invalidated by a court, *would have the force of law*" (emphasis added). Who, I ask, should have the power to determine what regulations should be issued which have the force of law, unless it is the Congress? The reservation to Congress of the power to disapprove regulations proposed by the Department of Education is nothing more than the retention by Congress of its constitutional function of passing laws--a function which, I would argue, it cannot delegate. Indeed, under the very separation of powers arguments made by the Department of Justice, only Congress can take actions which have the force of law. The President and the executive branch are limited to faithfully executing the laws, not issuing regulations which have the force of law.

As I already mentioned, the idea that there can be executive action other than action which is authorized by Congress is the fatal defect which permeates the Department of Justice position. For example, consider the statement, again taken from the letter of the Attorney General to the Secretary of Education, that "much, if not indeed most, executive action *can be* the subject of legislative prescription" (emphasis added). The contrary is true. There can be *no* executive action outside the areas of commander in chief and the granting of pardons, reprieves and receiving ambassadors, *unless it has been the subject of legislative action*. To contend otherwise is "to reduce the doctrine of separation of powers to a mere shadow."

I will touch only briefly on the argument that the Congress cannot interpret a law because that would be invading the province of the judicial branch. Obviously, the executive branch interprets a law when it executes the law and the legislative branch interprets the law when it decides whether a new law or modification of the existing law is in order. Each of these branches interprets the law in performing its own separate constitutional function. Similarly, the judicial branch interprets the law in carrying out its judicial function of resolving cases or controversies properly brought before it. As made by the Department of Justice, this argument that only the judicial branch can interpret the law is a red herring.

Let me also point to the clear parallel between legislation containing a "legislative veto" provision and legislation authorizing the appointment of officers of the federal government. If the Congress by law vests the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments, it may not without further legislation assert a power in the Senate to advise and consent to such appointments. But Congress can reserve such a power to the Senate. Congress has the constitutional power to do it either way--to participate or not to participate in the appointing process.

Similarly, Congress may, if it desires, retain for itself the power to participate in the process by which agency rules and regulations are promulgated by providing by statute, presented to the President, and if necessary passed over his veto, that any such rules or regulations shall not become effective unless approved by, or not disapproved by, Congress. The President is not being ignored by such a provision, nor is his veto power. Nor is the judicial function of interpreting the law invaded. It is simply that the Congress has determined the extent of its own participation in the rulemaking process under the broad scope of choice granted to it by the necessary and proper clause of the Constitution.

The observations which I have made to this point are my own but they coincide with the views expressed by the members of this Committee at the time that the amendment providing for legislative control over the rules and regulations issued by the Department of Education for programs under P. L. 95-561 was considered and adopted. For example, the sponsor of the amendment, Congressman O'Hara, said at the committee session on November 27, 1973 that the amendment simply would provide that before any regulation promulgated by the Office of Education or the Department of Health, Education and Welfare with respect to those laws became effective it would have to be submitted to Congress and could not take effect if it was disapproved by either House of Congress within ninety days after its submission. He said at that time, as I have said now, that "there is no law making power anywhere in government except in the Congress" and that under Democratic and Republican administrations alike, the people who make the regulations are, in effect, making new law and trying to improve what the Congress has done. "In effect," he said, "they are making law just as much as we are, and I want to put a stop to that."

That is precisely what the Attorney General admitted in his letter to the Secretary of Education that the intent of the Department was--"that without a legislative veto, the regulations of your Department, unless invalidated by a court, would have the force of law." It is this lawmaking activity by the Department that the amendment was intended to put a stop to, and that is the very way the amendment was explained in the committee meetings. It was a bipartisan position, and after some reworking to reduce the time that Congress would have to adopt a resolution of disapproval and to require a concurrent resolution of disapproval by both Houses of Congress in order to reject proposed regulations, the amendment was adopted by this committee by a vote of 28 to 0.

I hope that these views will be of assistance to the Committee and I thank you for the opportunity to present them.

Chairman **Perkins**. Let me compliment and congratulate you gentlemen.

I don't think I have ever heard an issue stated more forthrightly and clearly than you gentleman have stated the problem.

One brief question: We have a conference coming up. What would you suggest that the House Committee on Education do in the situation which we are confronted with?

You have heard the testimony today. Go ahead, Professor Gressman, and then Mr. Kennedy.

Mr. **Gressman**. Do you mean in relation to the gauntlet thrown down by the Attorney General?

Chairman **Perkins**. Yes, you heard Mr. Harmon from the Attorney General's office.

Mr. **Gressman**. Yes. We met Mr. Harmon many times in court as well, though I am not on his cocktail circuit.

I would say that it seems to me that this particular effort to confront the Congress with a constitutional crisis is going to be washed away by the efforts, the good efforts of the Secretary of Education to revise these rules.

I assume those rules are going to come back up here for your review and possible approval or disapproval, and that if, as she says, she has attempted to meet all the objections you made in disapproving the prior regulations, then I think this is going to wipe out the immediate confrontation—the reason for the confrontation as well as any possible litigation arising by aggrieved individuals from the prior regulations.

So I would guess that this is the right way to dispose of this particular effort, to confront you with this crisis, because it is not a real crisis to begin with. It is an illusory kind of claim and problem that the Attorney General has created. He simply hasn't done his homework. He hasn't even read this statute. If he read the statute, he would find that there is no veto of any regulation that has become a part of the fabric of the law.

Let me, in just one sentence—to conclude—read you one sentence or two sentences from the *Atkins* decision of the Court of Claims, which I think captures what is so terribly wrong about this phony constitutional confrontation that the Attorney General would foist upon the Congress.

The Court of Claims, in that case, was dealing with the judge's claim under the Salary Act, which involved what we call a one-House veto of the Presidential recommendations of salary.

The Court said,

> We reach this decision by virtue of the simple fact that the single House, in voting by majority to block the otherwise automatic effectiveness of the President's recommendations, is not doing anything for which the Constitution requires the concurrence of both Houses under Article I, section 7. The single House is certainly not making new law.
>
> The Department of Justice error is traceable back to the faulty assumption——

says the Court—

> * * * that the President's recommendations themselves are automatically the law which the single House action of veto or disapproval then changes.

But, at most the Salary Act like the Education Act we have here——

> * * * only accords the President's recommendations the potentiality of becoming law if neither House objects within 30 days of their announcement and it does not give those regulations the force and effect of law ab initio.

Mr. **Kennedy**. Mr. Chairman, I might say in specific answer to your question that I was involved, although Professor Gressman was not, in the GSA case involving the Presidential papers, peripherally involved because most of those legislative actions were taken by the Senate.

The ultimate result of that legal controversy was—and I think perhaps Mr. Harmon may have given the incorrect impression to the committee—was that that was washed out in the court proceeding.

It was raised in the court proceeding and washed out when the Department of Justice agreed with the position that since the regulations had subsequently been amended to meet the Congress's objection, the issue would no longer be pressed.

I think that is clearly in line with the feelings expressed by the members of your committee that it is desirable to work out an amicable result rather than a legal result if at all possible, because many judges, professors, Justices of the Supreme Court, have commented on the fact that our Constitution does build in certain tensions; that is a part of our process.

It is usually unfortunate to take those tensions to the point where there must be absolute controversy.

Chairman **Perkins**. Thank you, gentleman, very much. We appreciate your appearance and help here today.

The majority of us, Mr. Ford and myself, Mr. Goodling, Mr. Erdahl, we are going to another conference. We have other witnesses from Kentucky. I am sorry about the situation. We should have been over there at 1 p.m. They are waiting on us now on the Senate side.

I am going to ask Mr. Kramer, who is not on the conference, to come here and hear the Kentucky witnesses, if you don't mind, Mr. Kramer.

The Kentucky witnesses will come around. I think we understand your problem. Several people have discussed it with me. If we can get some legislation, I would like to see us get started as soon as possible to wipe out this indebtedness that is, in my judgment, going to be charged against you by an audit.

I want to do anything I can to be as helpful as possible.

STATEMENT OF DON HART, DIRECTOR, DIVISION OF COMPENSATORY EDUCATION AND EDWARD L. FOSSETT, OFFICE OF LEGAL SERVICES, KENTUCKY STATE DEPARTMENT OF EDUCATION

Mr. **Hart**. Thank you.

Mr. **Kramer**. Welcome to the committee.

Mr. **Fossett**. Thank you, Mr. Chairman. I would like to move that our prepared statements be placed into the record. We came to speak only on that portion of the regulations dealing with the Education Appeals Board.

First, we commend the committee for their veto of the disapproval action.

Second, we point to one other situation which we would hope that this committee would look at in their future considerations of this and other regulations, that is, that in the preamble, part (b) of the preamble of the regulations, the Education Appeal Board assumes jurisdiction of the final audit reviews that were pending before this act became effective; that many of those reviews are as old as 12 years.

I think there are some 31 now before them.

The case in Kentucky results from a 1973-74 audit. It concerned practices initiated in 1968. The act itself requires that the Secretary adopt procedures which will insure timely and appropriate audit resolutions.

Every indication is that these cases now pending will continue to pend for many, many more years; that the new cases under the act will be sharing a docket that is already crowded with cases that are old.

We, therefore, request—as Chairman Perkins alluded to—that consideration be given to a bill of relief for those old cases pending that were not a part of or subject to this law.

We hope that the subcommittee and the Congress would consider favorably such a bill of relief.

I thank you very much for the opportunity to appear and for hearing us.

[The information referred to above follows:]

Prepared Statement Presented by Don Hart, Director, Division of Compensatory Education and Edward L. Fossett, Office of Legal Services, Kentucky State Department of Education

The Department of Education, Commonwealth of Kentucky, recognizes and agrees with the concept and requirement of P.L. 95-561 that both the Department of Education and the state educational agency should take all necessary action to insure the fiscal integrity in grants and compliance with the applicable statutes, regulations, and terms and conditions of such grants. However, the major emphasis should and must be on the early detection and correction of failure of substantial compliance. Otherwise, the penalty that is to be exacted is counterproductive to the education of children, particularly those which Title I is intended to serve.

For this reason, the Kentucky Department of Education takes exception to Part B of the preamble of the regulations in question wherein the jurisdiction is assumed over appeals from final audit determination letters issued by authorized Office of Education officials prior to March 1, 1979, in Title I, ESEA. This group of appeals includes numerous appeals, some of which were precipitated from audits performed as early as 1968. In Kentucky's case, it included an audit for the 1973-74 school year. While these appeals are in various stages of resolution, past performance of the appeals board gives every indication that many more years will elaspe before these cases are finally resolved.

These appeals were brought originally before an appeals board which had no congressional authorization. That board was established by a notice published by the Office of Education in Federal Register, 37 Fed. Reg. 23002. No public comment period was provided and there was no statutory authorization for such a board. In July of 1974, the Office of Education sent out mimeographed sheets of general provisions which established rules governing appeals before this board. These mimeographed rules were not published in the Federal Register nor subjected to public comment.

Those audit findings which, pursuant to P. L. 95-561, are to be heard by an appeals board authorized by Congress must, therefore, share a docket with cases already six to twelve years old and for which there is no Congressional authorization. We submit that this assumption of jurisdiction of the old cases is repugnant to P.L. 95-561, Section 185(b). The Commissioner is required to adopt procedures that "will assure timely and appropriate resolution of audit findings."

In Kentucky, it has been the continuous policy that as soon as any appropriate official of the Office of Education has indicated that any particular practice or procedure in a Title I program is not in compliance with appropriate statutes, regulations, and terms and conditions of a grant, immediate steps are taken to bring such practices or procedures into compliance as soon as possible.

However, in many situations, including the 1973-74 audit of Kentucky, the state educational agency in good faith believed a practice to be in compliance and it is only after the fact that the audit exception for the first time raises the question of non-compliance. (In Kentucky's case, the practice to which exception was taken had been initiated some five or six years earlier and, through those years, management teams from the Office of Education had made visitations and witnessed such programs and practices in local school districts. Because of the educational success of such programs, the Department had openly and in good faith encouraged other school districts to adopt the program.)

Under the proposed Regulation 100d.7, the state educational agency has no choice but to subject itself to the lengthly and complex appeals board process since that section required the recipient to exhaust administrative remedies before it has standing to file a law suit. This regulation therefore militates that the administrative procedures should be timely.

Many times the audit exception involves a multitude of local educational agencies. In the case of the audit in Kentucky in 1974, fifty local school districts were involved in the exception. Regulation 100d.16 places the burden of proof of the allowability of expenditures on the appellant. As each year goes by, a substantial number of teachers, administrators, and Title I coordinators at both the local and state level retire, transfer, or resign. Records, not required by law to be maintained but which are essential to provide the burden of proof, are no longer available. Therefore, as each year goes by, it becomes more and more difficult, if not impossible, for the appellant to meet this burden of proof. This once again demonstrates that timely procedures are of the essence.

At the end of the protracted years of administrative procedures, if it is resolved by the appeals board that the state agency had allowed Title I funds to be misspent or misapplied by local educational agencies and damages are to be repaid to the federal government, the state agency must seek such funds from the state legislature or sue the applicable districts. (While proposed Regulation 100d.43 allows intervention by a willing party, there is no method whereby the state educational agency can force a local agency to participate in the appeal.)

In many situations, the state agency, including Kentucky in 1974, openly and in good faith approved, promoted, and encouraged local educational agencies to follow the practice that was later the subject of audit exceptions. In such situations, suits against the local agencies would be fruitless. In all cases, suits initiated by the state educational agency against the local educational agency would not likely result in the availability of funds to meet the time frame requirements of reimbursement to the federal government. Since the recovery of funds by the state agency from local districts is counterproductive as to expense, educational results, and the effective relationships between the two entities, it should be avoided except in the most extreme situations.

Few if any state educational agencies have funds available from which they can legally reimburse the federal government and the only choice such agencies have is to request appropriations from state legislatures. Appropriations by state legislatures to meet reimbursement requirements will of necessity ultimately result in reduced appropriations for other educational purposes. It will be counterproductive to the educational goals of Congress, as well as state and local educational agencies.

We submit that the continuation of such appeals by the appeals board is not only untimely and inappropriate in so far as these appeals are concerned but must of necessity result in delaying the timeliness of all new resolutions of audit findings contemplated by Congress in P.L. 95-561. We, therefore, urge that Congress give serious consideration to a bill of relief to all audit exceptions now pending before the appeals board which were occasioned by audit determinations prior to the effective date of P.L. 95-561 and that Congress prohibit the assumption of jurisdiction of these appeals by the appeals board. We further urge that the entire emphasis of timely and appropriate resolution of audit findings should be placed on early detection and early correction of non-compliant practices and procedures and that the lengthly and complex process of audit appeals be limited only to egregious cases.

Respectively submitted for the
Department of Education in Kentucky,

Don Hart

Don Hart, Director
Division of Compensatory Education

Ed Fossett

Ed Fossett, Attorney
Office of Legal Services

Mr. **Kramer** [presiding]. We thank you for your testimony.

I read Mr. Scanlon's testimony while sitting up here at the bench. Some of the points that he made were very similar to some of the ones that you are making in terms of requesting a particular result.

If it comes from both north and south of the Mason-Dixon line at the same time, it must not be all bad. We appreciate you coming and we do apologize again for having to keep you here so long.

Mr. Hart, did you want to make a statement?

Mr. **Hart**. I have no further statement.

Mr. **Kramer**. Thank you very much.

If not, the committee will stand adjourned subject to the call of the chairman.

[Whereupon, at 1:20 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

[Information submitted for the record follows:]

Association of American Publishers, Inc.

aap

1707 L Street, N.W.
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Washington, D.C. 20036
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STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS
Committee on Education and Labor
U.S. House of Representatives
September 1980

The Association of American Publishers (AAP) is the general association of book publishers in the United States. It comprises the General Publishing Division, Direct Marketing/Book Club Division, Technical, Scientific and Medical Division, International Division, College Division, Mass Paperback Division, and School Division. Our over 330 member publishing houses produce the vast majority of general trade, educational, reference, professional and religious books published in this country. AAP members publish 80% of the instructional materials used in the nation's classrooms.

The Issue

Publishers are concerned with proposed Title I regulations which are contrary to both the letter and spirit of the law and which would undermine the long-established maintenance of effort requirement. Specifically, Par. 116.91(f) of the proposed ESEA Title I regulations published in the June 11, 1980 (Vol. 45, No. 114) Federal Register states:

> (f) Two percent leeway. For purposes of determining the LEA's or State agency's compliance with the basic standard in paragraph (a) of this section, the SEA may disregard a decrease of less than two percent from the second preceding fiscal year to the first preceding fiscal year.

Thus, the regulation provides that a local education agency may reduce its education expenditures by 2% from the base year and still be considered in compliance with the law.

Rationale

1. The regulation is contrary to the following provision of law:

   (i) Subsection (a) of Section 126 which mandates maintenance of of effort,
   (ii) Subsection (b) of Section 126 which limits use of funds to excess cost,
   (iii) Subsection (c) of Section 126 which provides that Federal funds may only supplement and not supplant regular non-Federal funds, and
   (iv) Subsection (d) of Section 126 which states that Federal funds are required to supplement, not supplant, non-Federal funds for certain special state and local programs.

/more/

2. There is very strong House report language on this issue in HRpt 95-1137, the text of which is included in the attachment to this testimony.

3. The ability of an LEA to utilize per capita expenditures rather than total expenditures offers an opportunity for a decrease in total maintenance of effort without penalty.

4. Permitting a 2% decrease at a time of double digit inflation has little foundation.

5. According to the Census Bureau, the nation's public schools in FY 1977-78 cost $83.6 billion. A 2% reduction in that amount would be $1.672 billion. To put it another way, the Department would be embarrassed if the Appropriations Committee decided to follow the proposed rule (a 2% reduction is considered as no reduction at all) and cut ESEA by some $60 million (2% of its 1981 budget).

6. Since LEA's spend 1.1% of their total budgets for instructional materials, a 2% reduction in maintenance of effort would exceed the total amount spent on instructional materials.

7. Over a period of five years a reduction in non-Federal expenditures of almost 10% would be countenanced.

The Finality of "Proposed" Regulations

While these Title I regulations were submitted in the June 11 Federal Register as "proposed" regulations, the Department of Education has given them the effect of final regulations. Chief state school officials were told by the Department that these so-called proposed regulations "may be relied on as permissible ways of meeting Title I requirements" in the 1980-81 school year. Title I coordinators were sent bulk shipments for distribution in their states. And this was done before the August 11 deadline for comments to the Department on the "proposed" regulations.

Thus, state and local education agencies are now relying in good faith upon these "proposed" regulations. This makes the regulations more difficult to change. One need only recall Secretary Hufstedler's comments in her July 23 letter to Chairman Perkins in which she refused to change the regulations on the Education Appeal Board which Congress had declared were inconsistent with the law because, as the letter stated, "We are mindful that a change in our regulations on the point could cause serious harm to state and local education agencies that have relied on the regulations as issued".

It is hoped that it may be made clear that enacted law, even after two years, should be relied upon rather than either "proposed" or "final" regulations.

ATTACHMENT

Excerpt from House Report 95-1137 (May 11, 1978) on the Education Amendments of 1978 (HR 15).

(3) Maintenance of Effort

The cornerstone of ESEA and similar Federal aid-to-education programs is the premise that Federal aid must supplement—not supplant—State and local expenditures. The historic intent is that Federal dollars must represent an additional effort for the target children; thus, State and local education program expenditures must be maintained at previous levels.

Present law provides for two very complex procedures to be used in determining whether a State or local school district is to be permitted a waiver of these maintenance of effort requirements under various Federal programs. The Committee bill simplifies this procedure by deleting what is now called the "very exceptional circumstances" procedure and by making applicable only the "exceptional circumstances" procedure.

This amendment means that the Commissioner is authorized to waive these requirements for a single fiscal year in cases of exceptional or unforeseen circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State or local educational agency. An example of the latter would be a major industrial or commercial facility leaving the area, thus diminishing the revenue base. However, the decision of a State or local legislature to slash the education budget would not in and of itself constitute a valid decrease of financial resources since this is a voluntary and controllable act: such a reduction is, in effect, a refusal to use revenue resources which are available. Finally, a waiver of maintenance of effort may not be taken into account when computing the fiscal effort in subsequent years. Otherwise, the reduced amount would be a base year in perpetuity. The General Accounting Office has found, however, that HEW does little, if any auditing of maintenance of effort at State and local levels, and that consequently the existence of such effort and the extent of misreporting of data is quite simply not known. The Committee urges HEW, in the strongest terms possible, to begin to enforce these provisions of law. These requirements undergird Federal aid to education, and there is no excuse for not securing their enforcement.

Second, the GAO found that OE is applying the so-called 95 percent rule, which allows States and local districts to maintain effort for 95 percent or more of the base year's expenditures on either a per student or an aggregate basis, to ESEA Title I and to the Vocational Education Act, although there is no legislation specifying a 95 percent rule for either of these programs. Specifically, the regulations for the vocational education program allow a 5 percent reduction in each fiscal year based on the previous year. Thus, over a period of 5 years, a local educational agency would be permited to reduce its expenditures by 22.6%. This could also happen under Title I in practice, although proposed regulations have not been issued for maintenance of effort for this program.

The Committee states that it believes a "declining" maintenance of effort provision as provided in the vocational education regulations violates the Congressional intention in enacting the Vocational Education Act, and therefore HEW is urged to revise those regulations. The Committee also urges HEW to review the legality of applying the 95 percent rule to that Act and to Title I. If HEW feels such a provision is necessary, it should ask Congress for its enactment.

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CONGRESSIONAL DISAPPROVAL OF EDUCATION REGULATIONS

by

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September 12, 1980

CONGRESSIONAL DISAPPROVAL OF EDUCATION REGULATIONS

INTRODUCTION

Congressional disapproval of regulations has become an item of controversy between the Legislative and Executive Branches during the Carter Administration. This paper includes background information on the current issue between the Department of Education and the Committees on Education and Labor and on Labor and Human Resources, provisions of the General Education Provisions Act (GEPA) that authorize congressional disapproval of regulations, a summary of the legislative actions that have contributed to this section of GEPA, and three appendices that contain references for the concurrent resolutions enacted by the 96th Congress, a general summary of GEPA, and a copy of a letter on this issue from Attorney General Civiletti to Secretary of Education Hufstedler. The intent of this discussion is to provide historical background information on the issue rather than to present a legal or a theoretical discussion of the general issue of the congressional veto.

The initial impetus for the current issue can be traced to the Education Amendments of 1972 when the Congress became concerned about the efforts of the Executive Branch to consolidate programs and programs without specific authorization and to decentralize education program decision-making to regional offices throughtout the nation. Following this initial legislation to prohibit those actions, further action was taken in the Elementary and Secondary Education Amendments of 1974 to require that education regulations be submitted to the Congress for review and possible disapproval. Points of difference were usually resolved informally until the current situation in which formal action was taken by the Congress.

BACKGROUND

The adoption of resolutions by the Congress to disapprove four sets of Department of Education regulations and the contention by the Secretary of Education that such actions were not considered to be binding on the Department have contributed to an increased interest in the congressional disapproval of regulations and the manner in which statutory provisions related to education program regulations have evolved.

In May 1980, final action was taken by both Houses of Congress to disapprove regulations related to (1) grants to States for educational improvement, resources, and support authorized under Title IV of the Elementary and Secondary Education Act of 1965, as amended; (2) the Education Appeal Board; (3) the Arts in Education Program; and (4) the Law-Related Education Program. A resolution to disapprove regulations pertaining to adult education programs has been reported by the Committee on Education and Labor of the House of Representatives. 1/

Following the congressional actions on the four sets of regulations, the Secretary of Education requested an opinion from the Attorney General concerning the constitutionality of Section 431 of the General Education Provisions Act that authorizes the Congress to disapprove regulations by concurrent resolution without submission of such actions to the President for his approval or veto.

1/ See Appendix A for additional detail.

On June 5, 1980 the Attorney General responded to the Secretary of Education indicating that the Secretary's acceptance of "these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the Executive Branch, . . ." 2/ These recent developments have made the process of congressional review of education regulations an issue of concern for the Congress in its relations with the Department of Education.

The concept of the congressional veto represents an effort by the Congress to review the regulations promulgated by an executive department to implement legislation. This effort is not unique to the area of education, for over 200 statutes contain approximately 300 provisions that provide for some form of review of regulations by the Congress. 3/ Even though President Carter has supported use of the congressional veto for executive reorganizations, he has objected to congressional vetoes affecting the administration of laws and programs. 4/ Statutory provisions related to education are more comprehensive in impact because of the existence of the GEPA. 5/ In most cases, the veto is applicable to a particular statute or program; however, through the GEPA, the congressional veto can be extended to all regulations for Department of

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2/ See Appendix B for copy of the Attorney General's letter.

3/ U.S. Library of Congress. Congressional Research Service. Congressional review, deferral and disapproval of Executive actions: a summary and an inventory of statutory authority by Clark F. Norton. [Washington] 1979. 127 p. (Report no. 76-88 G); ______. 1976-1977 Congressional acts authorizing prior review, approval or disapproval of proposed Executive actions. 1978. 26 p. (Report no. 78-117 Gov); ______. 1978 Congressional acts authorizing congressional approval or disapproval of proposed Executive actions. 1979. 41 p. (Report no 79-46 Gov).

4/ U.S. Library of Congress. Congressional Research Service. Congressional veto of Executive actions [by] Thomas J. Nicola et al. [Washington] 1976. 11 p. (Issue brief 76006) Regularly updated.

5/ See Appendix C for a summary of GEPA.

Education programs without specific statutory authorization in each instance. As indicated in the language of the statute stated below, the provisions in GEPA concerning the basis for congressional disapproval of education regulations are specific rather than general, i.e., a regulation may be disapproved only if it is "inconsistent with the Act from which it derives its authority." 6/

The GEPA provisions of interest in this discussion are as follows:

> Sec. 431(a)(1) For the purpose of this section, the term "regulation" means any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner.
>
> (2) Regulations issued by the Department of Health, Education, and Welfare or the Office of Education, or by any such official of such agencies, in connection with, or affecting, the administration of any applicable program shall contain immediately following each substantive provision of such regulations, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.
>
> (b)(1) No proposed regulation prescribed for the administration of any applicable program may take effect until 30 days after it is published in the Federal Register.
>
> (2)(A) During the 30-day period prior to the date upon which such regulation is to be effective, the Commissioner shall, in accordance with the provisions of Section 553 of Title V, United States Code, offer any interested party an opportunity to make comment upon, and take exception to, such standard, rule, regulation, or general requirement and shall reconsider any such standard, rule, regulation, or general requirement upon which comment is made or to which exception is taken.
>
> (B) If the Commissioner determines that the 30-day requirement in paragraph (1) will cause undue delay in the implementation of a regulation, thereby causing extreme hardship for the intended beneficiaries of an applicable program, he shall notify the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate. If neither committee disagrees with the determination of the Commissioner within 10 days after such notice, the Commissioner may waive such requirement with respect to such regulation.

6/ General Education Provisions Act, Section 431(d)(1).

(c) All such regulations shall be uniformly applied and enforced throughout the 50 States.

(d)(1) Concurrently with the publication in the Federal Register of any final regulation of general applicability as required in subsection (b) of this section, such final regulation shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such final regulation shall become effective not less than 45 days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation. Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under under any such Act, shall not represent, with respect to such final regulation, an approval or finding of consistency with the Act from which it drives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding. 7/

(2) The 45-day period specified in paragraph (1) shall be deemed to run without interruption except during periods when either House is in adjournment sine die, in adjournment subject to the call of the Chair, or in adjournment to a day certain for a period of more than four consecutive days. In any such period of adjournment, the 45 days shall continue to run, but if such period of adjournment is 30 calendar days, or less, the 45-day period shall not be deemed to have elapsed earlier than 10 days after the end of such adjournment. In any period of adjournment which lasts more than 30 days, the 45-day period shall be deemed to have elapsed after 30 calendar days has elapsed, unless, during those 30 calendar days, either the Committee on Education and Labor of the House of Representatives, or the Committee on Labor and Public Welfare of the Senate, or both, shall have directed its chairman, in accordance with said committee's rules, and the rules of that House, to transmit to the appropriate department or agency head a formal statement of objection to the final regulation. Such letter shall suspend the effective date of the final regulation until not less than 20 days after the end of such adjournment,

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7/ This sentence was added to Section 431(d)(1) by P.L. 94-142, Section 7(b), 89 Statute 769, approved November 29, 1975. Section 8(b) of P.L. 94-142 provides that amendments to Section 431(d), made by P.L. 94-142, are effective as of November 29, 1975.

during which the Congress may enact the concurrent resolution provided for in this subsection. In no event shall the final regulation go into effect until the 45-day period shall have elapsed, as provided for in this subsection, for both Houses of the Congress. 8/

(e) Whenever a concurrent resolution of disapproval is enacted by the Congress under the provision of this section, the agency which issued such regulation may thereafter issue a modified regulation to govern the same or substantially identical circumstances, but shall, in publishing such modification in the Federal Register and submitting it to the Speaker of the House of Representatives and the President of the Senate, indicate how the modification differs from the final regulation earlier disapproved, and how the agency believes the modification disposes of the findings by the Congress in the concurrent resolution of disapproval.

(f) For the purposes of subsections (d) and (e) of this section, activities under Sections 404, 405, and 406 of this title, and under Title IX of the Education Amendments of 1972 shall be deemed to be applicable programs.

(g) Not later than 60 days after the enactment of any part of any Act affecting the administration of any applicable program, the Commissioner shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate a schedule in accordance with which the Commissioner has planned to promulgate final regulations implementing such Act or part of such Act. Such schedule shall provide that all such final regulations shall be promulgated within 180 days after the submission of such schedule. Except as is provided in the following sentence, all such final regulations shall be promulgated in accordance with such schedule. If the Commissioner finds that, due to circumstances unforseen at the time of the submission of any such schedule, he cannot comply with a schedule submitted pursuant to this subsection, he shall notify such committees of such findings and submit a new schedule. If both committees notify the Commissioner of their approval of such new schedule, such final regulations shall be promulgated in accordance with such new schedule. 9/

8/ Section 5(b) of P.L. 94-43 (The Emergency Technical Provisions Act) provides that "Subsections (b) and (d) of Section 431 of the General Education Provisions Act shall not operate to delay the effectiveness of regulations issued by the Commissioner of Education to implement the provisions of this Act."

9/ (20 U.S.C. 1232) Enacted April 13, 1970. P.L. 91-230, Title IV, Section 401(a)(10), 84 Statutes 169; renumbered June 23, 1972, P.L. 92318, Section 301(a)(1), 86 Statutes 326; amended August 21, 1974, P.L. 93-380, Section 509 (a), 88 Statutes 566, 568; amended November 29, 1975, P.L. 94-142, Section 7, 89 Statutes 796; amended October 12, 1976, P.L. 94-482 Title IV, Section 405, 90 Statutes 2231.

Legislation Preceding Enactment of GEPA Regulations Provisions in 1974

Legislative documentation concerning the background and the intent of the provisions for congressional review of education regulations is somewhat limited. Congressional concern in the 1970's about the manner in which education programs were being administered and the possible diversion of funds to unauthorized programs is best illustrated by various portions of the Senate floor debate on an amendment introduced by Senator Cranston during consideration of the Education Amendments of 1972. 10/

The Cranston amendment was intended to limit Executive discretion in the establishment and administration of education programs. The contention was that inappropriate discretion had been exercised in various ways such as the following. Funds for the Upward Bound program reportedly were being "siphoned off" for the Right to Read program; this latter program had been established at the initiative of the Administration without specific authorization. Another example was the reported intent of the Office of Education to establish educational renewal centers without specific statutory authorization. 11/ Various contentions were made in the debate concerning the Administration's plans for the operation of current and projected programs. Senator Cranston indicated that the language of the budget request for that year suggested that the Administration was attempting to secure congressional approval for programs and activities through the appropriation process rather than the authorization route as intended by the procedures of the Congress. Also, the contention was made that scheduling requirements concerning the period of time

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10/ Cranston, Alan. Education Amendments of 1978. Congressional record [daily ed.] v. 118, February 28, 1972: S2707-S2732. J11.R5, v. 118.

11/ Ibid, S2719.

to elapse between publication of regulations and submission of applications were being ignored. Senator Pell reviewed various discussions and communications with the Administration concerning the issues and concluded with a statement in support of the Cranston amendment. 12/ In further comments, Senator Cranston indicated that the intent of the amendment was to enable the Congress to reassert its proper role in making policy decisions concerning education and to limit the discretion of the Administration in several areas (delegation of authority to regional offices, creation of new programs, and consolidation of existing programs) to the scope specifically authorized by the Congress. 13/ One of Senator Cranston's principal points was that the intent of the amendment was to prohibit "unauthorized program consolidations and unauthorized meddling with provisions of authorized legislation." 14/ Following the debate, the amendment was adopted and included in the Education Amendments of 1972. The intent of the Congress is further explained in the Conference Report accompanying the Education Amendments of 1972. Report comments were as follows:

> (b) Further the Senate amendment prohibited unauthorized program consolidation and limitation on appropriations not specifically authorized by law and created within the Office of Education a Bureau of Elementary and Secondary Education which shall have divisions of: Compensatory Education, Bilingual Education, School Assistance in Federally Affected Areas, Assistance to States. There was no comparable House provision. House recedes with amendments which clarify and reduce to some extent the scope of the Senate provisions prohibiting certain practices in the Office of Education. The Senate recedes on that portion of this item which would have created in the Office of Education a Bureau of Elementary and Secondary Education.

12/ Pell, Claiborne. Education Amendments of 1978. Congressional record [daily ed.] v. 118, February 28, 1972: S2719-S2728. J11.R5, v. 118.

13/ Cranston, Alan. Education Amendments of 1978, S 2711.

14/ Ibid.

The Senate amendment contained a provision which specifically prohibits unauthorized program consolidation and unauthorized limitations on the use of appropriations. The conference report contains this provision from the Senate amendment, with two modifications:

(1) Clause (iii) of subparagraph (C) of the proposed Section 421(c)(1) is modified to make clear that the Commissioner's authority under present law with respect to normal administrative procedures under existing education programs is not diminished. The modification of such clause is also intended to make clear that criteria governing the approval of applications may be derived by reasonable implication in the law, and such authority need not be stated expressly. It is the intention of the conferees that the basis for criteria for approval of applications must be found in statutory law, and that criteria for which there is no such basis may not be used in the approval of applications.

(2) The second modification of this amendment changes the language of clause (iv) of such subparagraph (C). This modification consists of the inclusion of language designed to make clear that the Office of Education can not as a matter of general policy make the approval of applications under one program dependent on the approval of applications under another program. This does not preclude, however, any action on the part of the Commissioner to make an individual application under one part of one program dependent upon the approval of an individual application under another program, if both applications come to the Commissioner from a single local educational agency.

This latter procedure is permitted on the basis of a project-by-project evaluation by the Commissioner, from which the Commissioner determines that the statutory purpose of both programs from which the appropriations are to be drawn is enhanced if their approval is joined.

The conference committee adopted a further clarifying provision which is a new sentence in subparagraph (A) of Section 421(c)(1). The new sentence provides that where the provisions of law governing the administration of applicable programs permit the packaging or consolidation of applications for grants and contracts, if such procedure is for the purpose of attaining simplicity or effectiveness of administration, nothing in subparagraph (A) shall be determined to interfere with such packaging or consolidation. The conferees added this sentence in order to make clear that subparagraph (A) does not prohibit consolidation where it is specifically authorized by law. However, the conferees do not intend that this additional sentence be construed to grant the Office of Education any authority which is not already provided in existing law. 15/

15/ U.S. Congress. House of Representatives. Education Amendments of 1972: conference report to acompany S. 659. Washington, U.S. Govt. Print. Off., 1974. pp. 206-207. (92d Congress, 2 session. House. Report no. 92-1085).

Following the enactment of the Education Amendments of 1972, several days of hearings were conducted by the Committee on Education and Labor in 1973 to secure background information on various programs and actions being considered by the Administration. 16/ As indicated in the Senate floor debate on the Education Amendments of 1972, the major issues appear to have been the efforts of the Office of Education and the Department of Health, Education, and Welfare to consolidate funding and administration for several programs for which there were independent authorizations and appropriations, the initiation of one or more programs without specific legislative authorization, and the transfer of decision making responsibility on program administration from Washington to a series of regional offices.

The basic rationale for the authority to permit congressional disapproval of education regulations was stated in the report from the Education and Labor Committee of the House of Representatives on H.R. 69, the Elementary and Secondary Education Amendments of 1974. Report language was as follows:

> The Committee bill amends the GEPA to require that all agencies and organizations which are recipients of Federal education funds must be apprised of any proposed additions or changes which affect their programs and must be afforded an opportunity to comment upon them. A copy of such standard, rule, regulation or requirement must be mailed to each agency and organization which is currently a recipient under such program; and these organizations will therefore be able to assess the impact of the proposed additions or changes on their programs and to participate in the 30 day comment period prior to final promulgation.
>
> The Committee bill also sets up a procedure by which proposed "standards, rules, regulations or requirements of general applicability" issued by the Secretary or the Commissioner in connection with most education programs administered by either of them, will be laid before the Congress for 45 days after their initial issuance, during which period the Congress can, by concurrent resolution, find that the proposed rule is not supported by the legislative authority on

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16/ U.S. Congress. House. Committee on Education and Labor. Subcommittee on Education. Elementary and Secondary Education Amendments of 1973. House of Representatives, 93rd Congress, 1st session on H.R. 16, H.R. 69, H.R. 5163 and H.R. 5823, Part 3. Washington, U.S. Govt. Print. Off., 1973. pp. 2958-2960, 2980-2982, 2992-2994, and 3005. Hearings held March-June 1973.

which it is based, and disapprove it. Disapproval is the only action the Congress can take under this procedure. It cannot amend, and need not approve, a proposed rule. If a resolution of disapproval is not agreed to by both Houses, the regulation will go into effect after the 45-day period runs out.

The problem which this amendment seeks to meet is the steady escalation of agency quasi-legislative power, and the corresponding attrition in the ability of the Congress to make the law. For at least four decades now, the agencies of the Executive Branch have increasingly used their rule-making authority to "correct" what they feel are the errors and ambiguities of the law. And for the same four decades, the Congress has, increasingly, given to those agencies, broader and broader areas of discretionary rule-making.

There is nothing in the history of this phenomenon from which either party can derive credit--and the blame for this silent transfer of the law-making authority can be shared equally by both Branches.

The Executive Branch, under administrations of both parties, has eagerly seized authority which Congress, under the control of either party, has all too carelessly allowed to slip from its hands. This amendment will permit the Congress to exercise the authority the Founding Fathers intended it to have, authority its brethren in other free Parliaments retain. This authority is essential both to the separation of, and to the accommodations between, the legislative and executive powers.

It is not anticipated by the Committee that this authority will be lightly used. The statute authorises the Congress to make an explicit finding that the proposed rule is not consistent with the legislation from which it derives its authority, and that finding, the Committee intends, should be set forth in detail in the concurrent resolution itself, or in the report accompanying it. Such a finding, and the disapproval of the relevant rule, will not go into effect until both Houses agree. And, although the Executive Agency is expected to correct its rule or regulation in order to meet the objections of the Congress, the procedure does not require them to do more than advise the Congress how a modified rule, in the opinion of the agency, meets the objections stated by the Congress. In the long run, the procedure assumes a certain degree of good-will and a mutual understanding of the limitations--neither definable or enforceable--which neither the Congress nor the Executive may permanently transgress if the separation of powers doctrine is to remain viable.

The phrase "standards, rules, regulations, and requirements of general applicability" is taken from existing law in Section 431. That section, apparently in reference to the same general body of administrative decision, utilises other words, including "guidelines, interpretations" and "orders." It is not the intention of the Committee that the choice of descriptive words in the new language should

> be interpreted in an exclusionary manner. The "standards, rules, regulations, and requirements of general applicability" to which the new procedure has reference should be understood to mean any administrative document of general applicability which the agency intends to govern the administration of applicable programs, or the activities of members of the public in connection with such programs. If an agency piece of paper is intended to be binding on the public, it should be issued under the procedures set forth in the new subsection (d) of Section 431. 17/

Additional congressional action concerning the GEPA provisions related to congressional review of education regulations was taken in P.L. 94-142 in the 2d Session of the 94th Congress. The following sentence was added to the previously enacted legislation:

> Failure of the Congress to adopt such a concurrent resolution with respect to any such standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption. 18/

Comments in Report No. 94-455 (94th Congress, 1st Session, Senate), state that failure of Congress to act is not to be construed as an indication of approval, as a finding of consistency, or as "an inference or presumption in any judicial proceeding." 19/ In addition, the amendments also clarified technical aspects concerning the beginning and ending of the 45-day period during which the Congress may act following transmittal of the final regulations for congressional consideration.

17/ U.S. Congress. House of Representatives. Elementary and Secondary Amendments of 1974: report to accompany H.R. 69. Washington, U.S. Govt. Print. Off., 1974. pp. 72-73. (93d Congress, 2d session. House. Report no. 93-805).

18/ U.S. Congress. Senate. Education of handicapped children: conference report to accompany S. 6. Washington, U.S. Govt. Print. Off., 1975, p. 40, (94th Congress, 1st session. Senate. Report no. 94-455).

19/ Ibid, p. 54.

Other efforts of the Congress to exercise review over administrative actions may be found in the congressional review of the family contribution schedule in the Basic Educational Opportunity Grant (BEOG) program. The schedule is to be revised annually by the Department of Education with the revision to be published in the Federal Register and submitted to the Congress by July 1 of the calendar year preceding the calendar year in which the academic year begins during which the BEOG funds to which the regulations apply are to be used. Prior to October 1, either the Senate or the House may adopt a resolution to disapprove the schedule. Since 1973, one or both Houses of Congress have held hearings on the schedule each year, except for 1977-78, and resolutions have been introduced; however, none of the disapproval resolutions has been adopted by either chamber.

APPENDIX A: CONCURRENT RESOLUTIONS TO DISAPPROVE DEPARTMENT OF EDUCATION REGULATIONS
96th CONGRESS, 2d SESSION

S. Con. Res. 91 (Pell)
Disapproves the final regulations pertaining to grants under Title IV of the Elementary and Secondary Education Act to State educational agencies for educational improvement, resources, and support authorized under the Elementary and Secondary Education Act of 1965. Introduced April 30, 1980; referred to Committee on Labor and Human Resources. Reported by committee (S. Rept. 96-769), and passed the Senate May 20, 1980. Passed the House May 21, 1980.

H. Con. Res. 318 (Perkins et al)
Disapproves the final regulations pertaining to the Education Appeal Board authorized under the General Education Provisions Act. Introduced April 24, 1980; referred to Committee on Education and Labor. Reported by committee (H. Rept. 96-939), and passed the House May 13, 1980. Passed the Senate May 5, 1980.

H. Con. Res. 319 (Perkins et al)
Disapproves the final regulations pertaining to the Arts in Education Program authorized under the Elementary and Secondary Education Act of 1965. Introduced April 24, 1980; referred to Committee on Education and Labor. Reported by committee (H. Rept. 96-940), and passed the House May 12, 1980. Passed the Senate May 15, 1980.

H. Con. Res. 332 (Perkins et al)
Disapproves the final regulations pertaining to the Law-Related Education Program authorized under the Elementary and Secondary Education Act of 1965. Introduced May 7, 1980; referred to Committee on Education and Labor. Reported by committee (H. Rept. 96-1032), and passed the House May 19, 1980. Passed the Senate May 20, 1980.

H. Con. Res. 337 (Goodling)
Disapproves the final regulations pertaining to the Adult Education Program authorized under the Adult Education Act. Introduced May 14, 1980; referred to Committee on Education and Labor. Reported by committee (H. Rept. 96-1228), August 19, 1980.

TESTIMONY ON FEDERAL AUDIT PROCESSES AND PROCEDURES

before

THE HOUSE SUBCOMMITTEE ON ELEMENTARY, SECONDARY
AND VOCATIONAL EDUCATION

September 18, 1980

Charles M. Cooke
Federal Program Coordinator
California Department of Education

Mr. Chairman, members of the Subcommittee, my name is Charles M. Cooke and I am the Federal Program Coordinator at the California State Department of Education. I wish to express my appreciation to the Chairman for providing this opportunity to express our concerns. While these hearings are focused upon a very large jurisdictional dispute (and correctly so), I should like to confine my remarks to the allied issue of Federal, State, and local educational agencies reponsibilities as they affect the overall issue of accountability.

As I have previously stated before this committee, it it my belief that the accountability for carrying out Congressional intent as embodied in its legislation and its deliberations is a shared responsibility — shared by Federal, State, and local entities. Such intent can only be carried out if all the partners required to be accountable are provided both the authority and responsibility to do so.

It is my contention (and the contention of the multi-State group with whom I was associated on this issue) that such shared responsibility has been neither the rule nor the way in which audit activities have been carried out in the past by HEW (now HHS).

In particular, the areas which need to be addressed are the following:

- The multiplicity of independent audit — Federal, State, and local
- The emphasis of the audit processes upon the recovery of funds rather than the improvement of the program
- The coordination among Federal offices with regard to audit, program, and policy
- The application, retroactively, by auditors of court decisions

With regard to the first point, as the processes and organizations are currently operating, it is not unusual for a single school district to be subjected to audit by a local independent audit, a State audit, and a Federal audit of the same program in the same year.

This, in and of itself, might be appropriate if each audit used the previous auditors' findings and checked them out or proceeded to build upon them. Such is not the case as each audit agency generally pursues its own line of investigation and gathering of data. This is burdensome, time consuming and, in the end, detrimental to the delivery of educational services to children.

Additionally, the current audit processes and procedures are programmatic in scope. Thus, there are auditors auditing Title I, other auditors auditing Title IV, and other auditors auditing ESAA, and so on. But we don't serve up education in separate dishes. The educational programs offered in a school should be designed and conducted in a fashion which addresses the entire educational needs of the child.

Why can't there be this coordination and consolidation of auditors? The primary reason at the moment is that statute and institutions encourage separateness, not integration.

To correct this deficiency, I would commend to the committee a serious examination of the audit processes and procedures currently in S. 878 — a bill reported out of the Senate Governmental Affairs Committee last week.

Sections 201 through 205 of that bill (copy attached) would establish the following:

- Standard accounting, auditing and financial management policies, procedures, and requirements for the administration of Federal assistance
- A single audit to be conducted at least once every two years — such audit will be of the recipient, not individual grants and programs
- Establishment of auditing standards and procedures so that independent auditors, State or local, meeting such criteria, will have their audits relied upon and built upon by Federal agencies

If the provisions of this bill (or similar ones) are enacted into law, it would go far to eliminate existing unnecessary, conflicting, and duplicative audit processes and procedures.

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It may be difficult, if not impossible, to refocus the nature of the audit process so that it will focus upon program improvement rather than the collection of funds.

The lack of collection of funds in the past has spurred much Congressional interest and discussion, and I need not dwell upon it other than to say that, in the end, it seems to me our overriding objective must be that Federally funded programs carry out their intent and provide programs of sufficient size, scope, and quality to assist the children in need.

I am not sure that overriding objective is served by an audit process focused upon recovery of funds.

I do not mean to cast aspersions upon the motives or expertise of auditors — Federal, State, or local. However, I am concerned about end results.

Are children in need best served by reducing the funds necessary to serve them? This question has plagued us since the beginning of Federal categorical programs. Any answer to this conundrum is further confused by the lengthy process for audit resolution. The current result (if carried out to the final conclusion) is that States, local education educational agencies and, most importantly, children, are penalized for "misdeeds" that have occurred five or six (and sometimes as much as 15) years previously.

This committee began to point to a way out of this labyrinth in Public Law 95-561 with the compliance agreement and repayment provisions. Unfortunately, the proposed Title I regulations will prohibit the use of this device in ameliorating the impact of audit fund recovery. Additionally, this committee in Public Law 95-561 has provided for the possibility of a 75 percent return to an agency for funds voluntarily repaid.

Both these provisions point toward a reasonable and equitable solution, but need to be meshed together so that the compliance agreement process can deal with audit issues and fund recovery does not have to go through an elaborate process of return to ED and re-return to the State and local agency.

The necessity for better coordination and discussions among audit, program and policy offices with regard to audit findings is a delicate and difficult area of social policy and organizational, as well as public, politics, and procedures.

Certainly the desire to maintain the independence of auditors from undue political pressure is correct. However, that should not mean that programmatic and policy consideration should not impact upon audit findings prior to final determinations.

At present, programmatic and policy input to audit determination happens at the tail end of the process. While there are currently, theoretically, discussions occurring between auditors and program operators prior to issuance of preliminary audit findings, we discover that such discussions, more often than not, do not occur.

I believe that much more discussions between audit and program must be required, if only to ensure that the auditors understand completely the programmatic requirements of the law. While I fully realize that auditors tend to believe that close interaction with program operators will "taint" their objectivity, I suggest without such interaction audit findings often do not reflect the actual programmatic requirements.

The policy impact upon audit determination is more difficult to deal with. The danger of politics overriding all other considerations is not unreal. However, it is also the case that longer range objectives and proper implementation of Congressional interest are properly the concern of and within the purview of policy level officials. Without their examination of the policy implication of major audit determinations, we are likely to get determinations which are indeed opposite to those longer range objectives and the original Congressional intent.

Currently, we have a process (with the Hearing Appeals Board et al) that makes it almost impossible for policy level officials such as the Secretary of Education to have any capacity to review audit determinations from a policy perspective prior to such determination becoming so encumbered with findings, hearing records, appeals, and the decisions of various levels that the policy level review cannot really impact on the outcome.

I realize these "checks" (and "balances?") were deliberately placed there because of certain specific Congressional concerns. What I am suggesting now is that it is time to review these checks and balances and adjust them to provide for a more adequate and equitable process.

Finally, I believe that the tendency of auditors to apply retroactively court decilsons must be curbed.

A direct case in point is the court decision in the Alexander vs. Califano case. That case represented a landmark decision with regard to the meaning of the supplement not supplant provisions of Title I.

In the court's deliberation and decision it was explicitly delineated by the judge that his findings were not to be applied retroactively to school districts in California.

Within a short period of time, the HEW auditors appeared in 62 districts in California holding them explicitly responsible for the findings of the court despite the judge's ruling otherwise.

The result is an audit determination that California school districts must return $28 million to the Federal Department of Education. We, naturally, are contesting this determination and will use every means we have to overturn this finding. But, had the decision not been applied retroactively, the issue would never arise because we implemented corrective action as soon as the judge's decision was final.

Thus, much time, effort, and dollars which could be better spent upon the provision of educational services to children in need will be spent instead upon overcoming an audit determination based upon retroactive applications of a court decision. In the end, should we lose our various appeals, children in need in California in the future will be penalized for actions which were corrected as of 1978. This, seems to me, to make neither good policy nor educational sense.

I greatly appreciate the opportunity to appear before your committee, Mr. Chairman, and I hope the information I have provided will be useful in obtaining Congressional action to clarify and rationalize the Federal audit process and procedures so that the children of this country will be better served in the future.

TITLE II—FINANCIAL MANAGEMENT AND AUDIT OF FEDERAL ASSISTANCE PROGRAMS

PURPOSE

SEC. 201. It is the purpose of this title—

(1) to improve the financial management of Federal assistance programs;

(2) to promote the efficient use of audit resources;

(3) to relieve State and local governments, especially small communities, and nonprofit organizations, of the costs and paperwork burdens due to conflicting and redundant requirements of Federal assistance programs; and

(4) to provide for the establishment of consistent requirements for the financial management and audit of Federal assistance provided to or administered by State and local governments and nonprofit organizations.

DEFINITIONS

SEC. 202. As used in this title—

(1) the term "financial and compliance audit" means a systematic review or appraisal of a recipient of Federal assistance to determine and report whether the financial operations of the recipient are properly conducted and financial reports are presented fairly; and whether the entity has complied with significant

compliance requirements contained in laws and regulations that can materially affect the entities' financial operations, conditions and reports.

(2) The term "public accountants" means certified public accountants, or licensed public accountants licensed on or before December 31, 1970, who are certified or licensed by a regulatory authority of a State.

(3) The term "independent auditors" means properly constituted State or local government audit agencies or public accountants, who have no direct relationship with the functions or activities being audited or with the business conducted by any of the officials of the government agency or unit being audited.

(4) The term "independent audit" means an audit conducted by independent auditors.

(5) The term "generally accepted auditing standards" means the auditing standards set forth in the financial and compliance element of the "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions", issued by the Comptroller General of the United States and incorporating the audit standards of the American Institute of Certified Public Accountants.

(6) The term "Federal assistance" means any assistance provided by an agency in the form of grants,

loans, loan guarantees, property, contracts, cooperative agreements or technical assistance to State or local governments or other recipients, except that such term does not include direct Federal cash assistance to individuals, contracts for the procurement of goods and services of the United States, subsidies, insurance or assistance provided by the Tennessee Valley Authority.

(7) The term "local government" means any unit of government within a State, a county, borough, municipality, city, town, township, parish, local public authority, special district, intrastate district, council of governments, other interstate government entity, or any other instrumentality of local government but shall not be construed to mean any Indian tribe as defined in section 3(c) of the Indian Financing Act of 1974.

(8) The term "entity" means a first level organizational unit of a State or local government or nonprofit organization, and includes all subordinate organizational units within such first level unit and all contractors providing services to such unit.

(9) The term "nonprofit organization" means an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code.

GENERAL FINANCIAL MANAGEMENT AND AUDIT

SEC. 203. (a) In order to insure that Federal accountability systems do not impose unnecessary, conflicting, and duplicative accounting, auditing, and reporting requirements upon State and local governments, especially upon small communities and nonprofit organizations, who are recipients of Federal assistance and in order to reduce the costs, paperwork, and regulatory burdens associated with Federal assistance programs, the Director of the Office of Management and Budget, in consultation with the Comptroller General of the United States, shall, consistent with applicable law, develop, establish, and maintain for use by all Federal agencies standard accounting, auditing, and financial management policies, procedures, and requirements for the administration, accounting, and financial auditing of grants, contracts, cooperative agreements, and other forms of Federal assistance to State and local governments and nonprofit organizations. Any such policy, procedure, or requirement shall not conflict with any applicable audit standard developed by the Comptroller General of the United States. Standard policies, procedures, and requirements developed by the Director of the Office of Management and Budget pursuant to this section shall include—

(1) terms, definitions, and conditions used in conjunction with grants, contracts, cooperative agreements,

and other forms of Federal assistance to State and local governments;

(2) generally accepted accounting principles and standards as required for financial accounting and reporting.

(3) uniform requirements for grant application forms;

(4) uniform principles and standards for sound financial management and auditing; and

(5) uniform payment policies for grants, contracts, cooperative agreements, and other forms of Federal assistance.

(b) The Director of the Office of Management and Budget shall prescribe directives to carry out the standard policies, procedures, and requirements established pursuant to subsection (a). Any such directive shall be binding on all Federal departments and agencies. Such directives shall prescribe effective means to coordinate Federal, State, and local audits of grant programs.

ACCOUNTING AND AUDITING PROCEDURES AND REQUIREMENTS

SEC. 204. (a) At least once every two years, there shall be a single independent financial and compliance audit of—

(1) State and local governments, or State and local governmental entities and the subgrantees of such

State and local governments or governmental entities; and

(2) nonprofit organizations or entities of nonprofit organizations and the subgrantees of such nonprofit organizations or entities,

which receive Federal assistance. Any such audit shall include an evaluation of the accounting and control systems of the recipient of Federal assistance and of the activities by the recipient to comply with the financial and performance requirements of grants received by the recipient from the Federal Government. Audits carried out pursuant to this section shall be audits of the recipient, rather than audits of individual grants or programs. In the case of any recipient of Federal assistance which receives less than $100,000 per year, the audit required by this section shall be conducted at least once every five years, but not more frequently than once every three years, unless there is evidence of fraud or other violation of Federal law in connection with such assistance.

(b) A State government shall have the responsibility for financial and compliance audits of the State government or State governmental entities receiving Federal assistance, and the subgrantees of such government or entities. A local government shall have the responsibility for financial and compliance audits of the local government, local governmental entities receiving Federal assistance, and the subgrantees of

such government or entities. A nonprofit organization shall have responsibility for financial and compliance audits of the nonprofit organization or entities of the nonprofit organization receiving Federal assistance and the subgrantees of such nonprofit organizations or entities./The audits shall be made by independent auditors in accordance with generally accepted auditing standards and shall include an opinion as to whether the recipient's accounting policies and financial statements follow generally accepted accounting principles and standards.

add unless by law, the state or local government has such responsibility, in which event the state or local government, as appropriate, shall have the responsibility for such audits.

(c)(1) The Federal Government shall be responsible, through the quality review process established pursuant to subsection (d), for assuring that financial and compliance audits conducted by independent auditors meet generally accepted auditing standards. Nothing in this title limits the authority of Federal agencies to make audits of Federal grants-in-aid to State and local governments, State and local governmental entities and the subgrantees of such State and local government or governmental entities: Provided, however, That if independent audits arranged for by State or local governments meet generally accepted auditing standards and other requirements established pursuant to subsection (d) Federal agencies shall rely on those audits and any additional audit work shall build upon the work already done.

(2) The Federal Government is responsible for conducting, or contracting (to such extent or in such amounts as are provided in appropriations Acts) for the conduct of, audits which are not financial and compliance audits.

(3) Nothing in this title limits the Federal Government's responsibility or authority to enforce Federal law or regulations, procedures or reporting requirements arising pursuant thereto.

(d) The Director of the Office of Management and Budget, in consultation with the Comptroller General of the United States, shall establish and approve a quality review process that will assure the proper performance of audits. Audits performed by Federal, State, or local government audit agencies which have been approved pursuant to quality review process shall be accepted by all Federal agencies making and administering grants.

(e) The Director of the Office of Management and Budget shall prescribe appropriate means for the reimbursement of independent auditors for actual expenses incurred for such parts of audits as are performed on behalf of the Federal Government, including provisions for—

(1) direct reimbursement for such expenses; and

(2) equitable financial settlements when such audits fail to meet the standards, policies, procedures, and requirements developed pursuant to section 203.

SEC. 205. The term State, as used in this title, shall not be construed to mean any Indian tribe as defined in section 3(c) of the Indian Financing Act of 1974.

TITLE III—INTEGRATED GRANT DEVELOPMENT

SEC. 301. This title may be cited as the "Integrated Grant Development Act of 1980".

PURPOSES

SEC. 302. The purpose of this title is to improve Federal assistance program performance by enabling State and local governments and nonprofit organizations to use Federal assistance more effectively and efficiently and adapt that assistance more readily to the particular needs of such governments or organizations through the wider use of projects drawing upon resources available from more than one Federal agency, program, or appropriation. It is the further purpose of this title to encourage arrangements between the Federal Government and State governments under which local governments and nonprofit organizations may more effectively and efficiently combine State and Federal resources in support of projects of common interest to the beneficiaries, the governments and organizations concerned.

DEFINITIONS

SEC. 303. For purposes of this title—